Supreme Court of the United States

OCTOBER TERM, 1912.

No. 84.

EDWIN M. KEATLEY, as Receiver of American Guaranty Company of Chicago, Under Appointment of the Circuit Court of Kanawha County, West Virginia, *Appellant*,

vs.

CARRIE REBECCA FUREY, as Administratrix of the Last Will and Testament of Charles La Tour Furey, Deceased; and also in Her Own Right; EDWIN A. POTTER, as Receiver of the American Guaranty Company of Chicago, by Appointment of the Circuit Court of the United States for the Northern District of Illinois, *et al.*

REPLY BRIEF FOR APPELLANT.

On page 10 of the brief of the appellee, is cited Miller's Admx. v. Newburg Orrell Coal Co., 31 W. Va., 836; and also the case in 47 W. Va., 838.

On the bottom of page 11 counsel for appellee says:

> "The same doctrine was laid down in a number of decisions in Virginia, from which state, as shown by Miller's Admx. v. Newburg Orrell Coal Co., 31 W.

Va., 798, *supra*, the statute under consideration was taken."

Sections 57, 58 and 59 were not taken from the Code of Virginia. They were enacted into law in the State of West Virginia in 1882. (See Acts of West Virginia, 1882, chapter 96.) The Virginia statute is found in the Code of Virginia of 1860, chapter 56, section 30, page 324, which embraces the Act of the Virginia Legislature of 1836-7, page 46. It is as follows:

> "When any corporation shall expire, or be dissolved, or all its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests, and such corporation may sue and be sued as before for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property and debts among those entitled thereto."

This section 30 was printed in the Code of Virginia, 1873, chapter 56, as section 31, page 543, the only difference being in a change of the number of the section.

But in the law of Virginia there is no section corresponding to either section 57 or 58, of chapter 53 of the Code of West Virginia. That is, there is no provision for the dissolution of a corporation by allowing one-third in interest to bring a suit to wind up its affairs, as provided in section 57; nor any provision providing for the appointment of a receiver to take charge of and administer its assets, as provided by section 58 of chapter 53 of the Code of West Virginia.

It is well, in arriving at the intent of the legislature, to note the marked distinction between section 30, chapter 56,

of the Code of Virginia, and section 59 of chapter 53 of the Code of West Virginia. All that the former does is to make the assets of the corporation "subject to the payment of its debts by it, and then to distribution among the members." Section 59 of chapter 53 of the Code of West Virginia dedicates the assets where a receiver has been appointed "to the payment of the liabilities of the corporation, and the expenses of winding up its affairs; and the surplus, if any then remaining, to distribution among the stockholders;" but it shall be under the order and direction of a receiver, or receivers, "appointed for the purpose by such Circuit Court, as is mentioned in the 57th section." The Virginia statute had no provision for the winding up of a corporation, or bringing of a suit by one-third in interest, of the stockholders, nor for the appointment of a receiver, nor prescribing the powers or duties of a receiver. It would be conceded at once that under the Virginia statute the property would be a trust fund, and after expiration, the trust would lack a trustee, and a court of equity would marshal the assets in a proper case, and appoint a receiver to hold the assets, but such a receiver would be the ordinary equity receiver, and his powers would come from the court appointing him and not from the statute.

Under the West Virginia law, in force when the American Guaranty Company of Chicago was incorporated, and which was in force during its whole life and is in force yet, the statute provides for the appointment of a receiver, prescribes his duties, and sections 58 and 59 of chapter 53 commit the entire assets of the corporation into the hands of such receiver.

It is incomprehensible that counsel should make the statement that these sections were taken from the Code of Virginia. Upon every point contended for by appellant, and passed upon by the Circuit Court of Kanawha County, West Virginia, the Virginia statute, up till the time the State of

West Virginia was formed in 1863, and sections 57, 58, and 59 of chapter 53 of the Code of West Virginia were adopted, was silent. It follows that it is not true that the Court of Appeals of the old State of Virginia put any construction on the law in question which could have any force here.

It is well to note another strong difference between the statute of Virginia, in question, and that of West Virginia. Section 30 of chapter 56 of the Code of Virginia, 1860, provides that if a corporation shall expire, or be dissolved, that such corporation may sue and be sued as before. The West Virginia statute (section 59) gives the right to suit after dissolution, but limits it as follows:

> "But so far only as shall be necessary and proper for collecting," etc.
>
> But all acts of the corporation after expiration or dissolution shall be done, in the case of no receiver, by the board of directors then in office; and in the case of the appointment of a receiver, by the receiver or receivers appointed for the purpose by such Circuit Court, as is mentioned in the 57th section.

It is incomprehensible how anyone can reason that a statute would in one breath commit all the property and assets of a corporation to a receiver, and then, in the next breath, authorize the stockholders and directors to sell its property, use its corporate seal, or do other acts.

It is as clear as anything can be that the legislative intent was to allow the board of directors to wind up the corporation, convey its property, institute and defend suits, in cases where the corporation was dissolved but no receiver appointed. In such case the board of directors then in office are required to wind up the corporation in a manner fixed by the statute, and the statute was intended to modify the common law in such a case to the extent of prolonging the life of a corporation for the purpose of

conveying its property, under the common seal or otherwise, and instituting and defending suits by the board of directors *in the corporate name*. However, inasmuch as section 58 provided for the appointment of a receiver, either after expiration or dissolution, the legislative intent is also clear that there might arise cases where creditors or stockholders would be dissatisfied with the action of the directors then in office, and in that event, provision was made for a receiver to step in. But no one would contend that the receiver and the directors then in office could do the same thing at the same time.

The whole contention of the other side will vanish at once by supposing the following state of facts: Take it that a corporation has been dissolved by the Circuit Court of the proper county, upon the application of one-third or more in interest, of the stockholders, and a receiver has been appointed, as provided in section 58, to take charge of and administer the assets.

Suppose that the receiver so appointed should sell a piece of property and should make a conveyance of it; then suppose that the board of directors in office at the time of the dissolution of the corporation should make a sale of the same property and make a conveyance. Which conveyance would be good and transfer the property, the conveyance of the receiver or the conveyance of the board of directors?

Suppose the receiver should commence a suit that was necessary for the collection of some assets. But suppose the board of directors should step in and compromise the claim. Could they do it? Could they both act?

We cannot presume that a legislature would do the silly thing of vesting the same power in the old board of directors after the receiver was appointed that such board had before. Why, the very purpose of appointing a receiver might be that the board of directors had not been man-

aging the assets properly. The very purpose of the receivership might be to take from the negligent or fraudulent directors the power to convey the property. It can thus be seen that the statute clearly puts the power to do a corporate act, after the expiration or dissolution, when no receiver is appointed, in the hands of the old board of directors; but in the case of either expiration or dissolution, when a receiver shall be appointed, then the powers and rights of the old board of directors cease, otherwise there is no need to appoint a receiver.

Therefore, it is clear that when the defendant corporation was dissolved by the decree of a West Virginia court, all the powers of the corporation to sue or to be sued, and its power to convey property, or to do any corporate act, ceased immediately upon the appointment of a receiver in West Virginia for the following reasons:

1st. Because it is the plain intention of the statute to have a receiver, who stands disinterested as to all parties, do the things which otherwise would fall upon the board of directors, otherwise the appointment of a receiver would be a vain thing;

2d. Because the statute otherwise construed would have the old board of directors and the receiver doing the same thing at the same time; and

3d. Because there is nothing complicated or involved about the statute, and by its plain words, fairly construed, it commits the entire assets of the corporation to the charge and administration of the receiver, and vests in him title, and likewise gives him power to represent and stand for the corporation, and even to use its corporate seal.

In the quotation from the opinion in 47 W. Va., 838, on page 11 of appellees' brief, the counsel should have added the following words to such opinion:

> "This is a radical change from the common law. A defunct corporation cannot be sued. 68 Thomp.

> Corp., paragraph 7370, says: 'After a corporation becomes dissolved it can neither sue nor be sued, unless the faculty of suing or being sued is prolonged by statute for the purpose of winding up its affairs.' The suit allowed by said code section has for its mission the winding up of the affairs of a defunct corporation by decreeing upon its assets: 1st, for the payment of its debts; next for distribution of the surplus among the stockholders."

On page 12, counsel quotes from the White Mountain Paper Company v. Morse, 127 Fed., 646, and states the following:

> "A New Jersey corporation was adjudged a bankrupt in New Hampshire although a prior decree of dissolution had been entered in New Jersey under the statutes of that State."

The cases, *in re* White Mountain Paper Company, 127 Fed., 180; and White Mountain Paper Company v. Morse and Company, 127 Fed., 643, should be read together.

In re White Mountian Paper Company, *supra*, held that where, after involuntary bankruptcy proceedings had been begun against a corporation in the United States District Court of New Hampshire, and decree of dissolution was entered in the court of New Jersey, the domicile of the corporation, such decree did not affect the bankruptcy proceedings; and in the case of White Mountain Paper Company v. Morse and Company, *supra*, the record discloses the following facts: That after the court in New Hampshire had acquired jurisdiction in the bankruptcy proceedings, and said proceedings were pending, on July 3, 1903, a bill of complaint was duly filed in New Jersey against the White Mountain Paper Company, defendant, which court was a court of competent jurisdiction to hear and determine all of the matters involved; that such court made an

order appointing a receiver of all of the assets and effects of said White Mountain Paper Company; that thereafter such proceedings were had, that on the 31st day of August, 1903, said corporation was duly and completely dissolved, and that because of the statute in the State of New Jersey in reference to this topic, providing as follows:

> "All corporations, whether they expire by their own limiation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, and to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which they were established."

It was held in the Circuit Court of Appeals that the judgment of the District Court, adjudging the corporation bankrupt, is affirmed.

Now at the time that such proceedings were had in the White Mountain case, section 59, on page 296, of the laws of New Jersey for 1896, was as follows:

> "Any action now pending, or to be hereafter begun, against any corporation which may become dissolved before final judgment, *shall not abate by reason thereof*, but no judgment shall be entered therein except upon notice to the trustees or receivers of the corporation."

It would be pertinent to inquire why counsel did not state the facts in the case. Counsel suggests on page 13 that it is difficult to understand the force of two cases cited by counsel for appellant, one from 47 W. Va., 45, and the other from 45 W. Va., 284.

In the case in 45 W. Va., cited in appellant's brief on pages 85 and 86, the words printed in italics on page 86, namely: "Said receiver, trustee, or assignee, being clothed with full powers of such corporations, and the right to exercise them insofar as necessary to wind up its affairs, is the sole legal representative thereof, with full authority to reduce to possession the corporation property wherever found," etc. Certainly, if such power was vested in the receiver it could not be at the same time in the dissolved corporation.

Counsel, on page 14, seems to build an argument upon the theory that counsel for appellant having obtained an order from the Circuit Court enlarging the powers of the receiver Keatley over those of receiver Black, that the doing of this is such a construction of the statute by appellant that no other construction can be placed upon it by the court.

Counsel for appellee is asked to answer the following question: If, as stated on page 42 of counsel's brief, "The Company's charter expressly provided that it shall keep its principal office or place of business in the city of Chicago, in the County of Cook, and State of Illinois," why did they allege in the bill filed in West Virginia,

> "5. That the principal office of said Guaranty Company ever since its incorporation always has been, and is, in the city of Charleston, in said Kanawha County, in the State of West Virginia?" (Rec., p. 25.)

For fear counsel shall not answer this question, we suggest that the reason is found in the provisions of section 57, which provides that those stockholders, of not less than one-third in interest, of the corporation, who *desire to wind up its affairs*, may apply by a bill in chancery to the Circuit Court of the county in which the *principal office* or place of business is situated.

Which is the truth?

To give that court jurisdiction these two things were necessary: 1st, to apply to the court in the *county* where the *principal office* was situated; and 2d, they must desire to wind up the affairs of the corporation.

We ask counsel further if it was intended to have a receiver of only limited jurisdiction why did the complainants pray for the appointment of a receiver "to take charge of and administer the assets?" Why did the other stockholders join in the prayer and particularly state "they respectively request that the said court shall grant the decree of dissolution of said American Guaranty Company of Chicago and appoint a receiver to take charge of and administer its assets?" (Rec., p. 30.)

Why did the corporation itself appearing pray "the appointment of a receiver to take charge of and administer its assets?" (Rec., p. 29.)

Why did the Court in its decree find that the prayer of "the complainants therein should be granted?" (Rec., p. 53.).

Why was Receiver Black appointed at all, and of what was he appointed receiver, if the corporation domiciled at West Virginia, having its principal office there, had no property within that State? Was it not a vain thing to appoint a receiver of nothing and require him to give bond?

Why did the complainants in the bill filed in the West Virginia Circuit Court make it appear that the corporation sought to be dissolved was a "going concern," and that after the payment of its debts and liabilities it would have several hundred thousand dollars left to distribute to its stockholders? Did not counsel know at that time that this corporation was insolvent?

Would the Circuit Court of West Virginia have entered the decree of dissolution had the court known the corporation was insolvent? Anyone reading the West Virginia de-

cision must conclude, if the facts as alleged are true, that the corporation was a wealthy one and had much property to divide among its stockholders. Why allege in the bill in Chicago that said corporation's stock was worth more than par?

Counsel says, on page 27: "There is no provision whatsoever in West Virginia for making any receiver appointed in dissolution proceedings a *quasi-assignee* of the company, or trustee, or representative of the company." This court held in Bernheimer vs. Converse, 206 U. S., 516, that a Minnesota statute very similar to section 58 made a receiver appointed under that statute a *quasi-assignee* or substantially that, and that the doctrine of the Relf vs. Rundell case applied.

Counsel, on page 29, makes the following comment in his brief:

> "If the title to the Guaranty Company's property was vested in the receiver by virtue of the statute, and not by virtue of the order appointing him, then it is strange that when appellant was appointed receiver September 22, 1909, and the first receiver, Black, was removed, the Guaranty Company and not the first receiver was directed to convey the property to appellant."

Possibly counsel for appellant took an unnecessary step in having the order made, directing a conveyance from the corporation. What of it? That proves nothing.

This is suggested to counsel for appellee: Suppose the receiver Black had died. Could not his position be filled? Taking the Relf v. Rundell case, suppose the insurance commissioner had died. Suppose another one had been elected. Would not the title have been in the new commissioner? The title to the property under the Missouri Act upon the dissolution of the insurance company was in the insurance commissioner and no specified person, "and to *his* successor in office."

The title to the property under the West Virginia statute was in the receiver appointed by the Court, not in any particular person.

Black was removed because he was an improper person to be the receiver.

There can be no question but that if the Court had power under the circumstances to name a competent person, it had power to remove an incompetent person and name a competent one.

Counsel says, on page 19 of his brief, "the total funds collected by receiver Potter, as shown by his inventory, were $1,409,234.07;"

On page 52, "the cash and securities in possession of appellee, as shown in inventory compiled by him on March 26, 1909, were $1,902,234.07." Of course, counsel has made these mistakes by inadvertence.

On page 264 of the record, the net claimed assets are shown to be only $792,864.99, and of these $565,891.37 was a special fund belonging to the contract holders. See record page 262.

Counsel, on page 21 of his brief, says: "The contract holders have no interest in the controversy, excepting as creditors, and the bill which was filed by the appellants as stockholders and creditors was filed not only on behalf of all other stockholders, but also on behalf of all other creditors of the company."

Counsel seems to have forgotten that the claim for the services of Furey, deceased, was at most only a simple contract debt. While the contract holders were lien-holders; by virtue of the contracts they each had a lien upon the assets in the hand of the Royal Trust Company, the trustee.

This corporation by reason of holding out to the public and incorporating into its contracts a statement that it had in the hands of the trustee an amount equal to 75 per cent of the cash surrender value of the policies, certainly when

that corporation became insolvent, and more, became dissolved, could not take such assets from the hands of such trustee and make them subject to the expense of a receivership and so deplete the assets which in equity belong to the contract holders and were to be paid over to them on dissolution. (Rec., p. 97.)

And as appears from the petition of the receiver, the $565,000.00 held by said Royal Trust Company was not equal to the sum required by the contract and that the corporation still owed the sum of $55,630.18. (Record, p. 72.)

Counsel says the Royal Trust Company was not the trustee, but a mere depository. (Brief of the appellee, p. 15.)

This agreement between the Royal Trust Company and the dissolved corporation is found in Record, pages Nos. 68 and 71. We believe the reading of that agreement will convince anyone that the Royal Trust Company was the trustee of an active trust.

We quote a few of the provisions of that contract:

> "Eighth. Upon surrender to the company of any special contracts upon which any reserve shall have accumulated, and been deposited with said trustee, said party of the first part shall be entitled to withdraw an amount from said reserve fund proportioned to 75 per cent of the withdrawal value thereof, upon evidence to said trustee of the cancellation of said special contract." (Record, p. 70.)
>
> "Thirteenth. If for any reason the party of the first part should desire to terminate this contract and transfer all or a part of the trust fund accumulated to another trustee or trustees, it shall have the right so to do upon giving thirty days notice in writing to the party of the second part, and an acknowledgment in writing duly signed by the new trustee, receipting for the securities so transferred shall release the party of the second part, the Royal Trust Company, from all

> further obligations to the amount so transferred either to the party of the first part, the American Guaranty Company of Chicago, or to any person or persons whomsoever." (Record, pp. 70, 71.)
>
> "Tenth. In case of the dissolution of the party of the first part the entire reserve held hereunder shall be divided among the holders of the special contracts in the proportion which said reserve bears to the net withdrawal value of each of said special contracts outstanding."

When this corporation was dissolved by its own request and the request of all its stockholders, this money at once became the property of the lien holders, the contract holders. But could a stockholder of this insolvent, dissolved corporation procure the appointment of a receiver on a simple contract indebtedness, if such existed, and in such receivership proceedings cause to be taken from the trustee that trust fund without notice to the lien holders, or contract holders, and without making the Royal Trust Company a party?

A statement of the proposition, it seems, is sufficient without comment.

Counsel says, on page 20 of his brief:

> "Counsel also suggests that all the stockholders of the Guaranty Company were necessary parties, but that two of them, Bigelow and Pitcher, are citizens of Illinois and are defendants to the case and, therefore, defeat the jurisdiction of the court below."
>
> "The answer to that position is that the record does not show the citizenship of Bigelow and Pitcher, and they are not defendants, and are not indispensable parties."

We supposed the rule to be that it was encumbent upon the party bringing the suit to show the citizenship of the various parties, and we do not think that that is not the rule even now.

Quoting further, counsel says:

> "It is also said the bill does not make Bigelow and Pitcher defendants and they have got into the suit only by filing their consent to the relief prayed for in the bill and for the appointment of a receiver. If they could be regarded as parties at all they would be ranged with the complainants. Under no circumstances can they be ranged with or treated as defendants. This must be so in view of the consent which they filed, there could not be, and was no possible controversy between them and the complainants."

But the same is true of the Guaranty Company. It has given the same consent that Bigelow and Pitcher gave, therefore, it can be ranged with the complainants.

And it is not an unusual thing for, in a proper case, a receiver to be appointed on the petition of the corporation itself.

It is suggested then that this does not assist counsel.

Counsel does not see that the fraud on the court in West Virginia in alleging in the complaint the solvency of the corporation and that it was a going concern; that the same thing being done in the Chicago bill were such fraud as would distinguish this case from any of the cases cited; to show that where the parties agreed to go into a Federal Court, that the fact of an agreement will not prevent the Federal Court from taking jurisdiction.

On page 49, counsel for appellee have quoted from 208 U. S., page 111, as follows:

> "That the parties preferred to take the subject-matter of the litigation into the Federal courts instead of proceeding in any of the State courts is not wrongful so long as no improper act was done by which the jurisdiction of the Federal court attached. The motive for bringing the suit there is unimportant."

But in that case the late Justice Peckham, speaking for the Court says:

> "We find no evidence of collusion and the Circuit Court found there was none. * * * There is no claim made that the averments in the bill were untrue, or that the debts named in the bill as owing to the complainants did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal Court."

This immediately precedes what counsel has seen fit to quote. But appellant claims that all these things, which were not found in that case, exist in the case at bar.

On page 51, counsel says, referring to the Royal Trust Company and the friendliness of such company, as suggested by appellant's counsel:

> "During all that time the Federal Court had been continuously administering upon the estate, it entered many orders, and disposed of a sharp controversy with the Royal Trust Company."

Let us again enumerate concerning the Royal Trust Company. This sharp controversy, commented upon, on pages 50 and 51 of appellant's brief, we refer to at this time.

It can hardly be considered a controversy that was sharp. Only to expedite matters the Royal Trust Company voluntarily appeared on the same day in which Receiver Potter filed his petition. Moreover on the very next day after Potter was appointed receiver, the Royal Trust Company wrote a letter, in answer to a telephone call, covering four pages of the printed record. Record, pp. 53-67.

Counsel says, on page 52: "Eight months before the West Virginia Court appointed appellant or authorized any receiver to take possession of any property outside of the jurisdiction of that Court, the Federal Court had already taken jurisdiction over the *res*."

And in other places in the counsel's brief reference is made to the delay of the appellant, or of petitioner Gilliam, or of other contract holders to do anything except submit to what was being done in the Federal Court.

The attention of this Court is called to the contract holders' agreement, found in Record, page 272-274. These contracts were sent out to the various contract holders long after the steps taken in the Federal Court had enabled the Receiver Potter to take the property from the Royal Trust Company.

Up to that time there was no authority whatever for any appearance by the contract holders' committee in behalf of any of the seven thousand contract holders.

Referring to the record on pages 175 and 176 the Court will find the first notice sent to the contract holders requiring them to file proof of claim, etc. This was on May 29, 1909.

It will thus be seen that the reason no action was taken is because all this thing was done in a corner, in the Court, without the contract holders being apprised of what was going on.

Again, we suggest to this Court, that if as a fact the stockholders had paid nothing for their stock, the receiver appointed by the Federal Court could not maintain an action to recover the value of such stock from the present stockholders.

Nor if there was fraud practiced by the board of directors could that receiver proceed against the several directors.

Only by the receiver appointed by the Court at the domicile of the corporation, when given such power by the statute itself, can such actions be maintained. This is the doctrine of the Bernheimer vs. Converse case in 206 U. S.

And finally we suggest again to this Court that sections 57, 58 and 59, of chapter 53 of the Code of West Virginia, are a winding up statute, and only the receiver appointed by the Court under those sections could do full justice, and because of that fact those sections were enacted.

But it is unnecessary to go further into this statement of facts. Counsel for appellant in their brief have made a fair presentation of the facts and we are content to leave such statement with the Court. There can be litle doubt, it seems to us, that there was collusion and fraud practiced to give the Federal Court jurisdiction in this case if the corporation had sufficient power after its dissolution under the statute of West Virginia to appear as they sought to do. We cannot suppose that it was the intent of the legislature of West Virgnia to pass any law of that kind. We cannot believe that a proper construction of such statute continues the life of the corporation after the proceedings which were had on the 1st of February, 1909, by which such corporation was dissolved and a receiver appointed.

Respectfully submitted,

F. W. HOUGHTON,

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Attorneys for Appellant, Edwin M. Keatley, as Receiver of the American Guaranty Company of Chicago.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

NO. [redacted] 84.

EDWIN M. KEATLEY, as Receiver of American Guaranty Company of Chicago, under appointment of the Circuit Court of Kanawha County, West Virginia, *Appellant,*

—vs.—

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APPELLANT'S BRIEF AND ARGUMENT ON MOTION TO DISMISS APPEAL.

F. W. HOUGHTON,
Attorney for Appellant,
Edwin M. Keatley, as Receiver, etc.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1910.

No. 612.

EDWIN M. KEATLEY, as Receiver of American Guaranty Company of Chicago, under appointment of the Circuit Court of Kanawha County, West Virginia, *Appellant,*

—vs.—

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APPELLANT'S BRIEF AND ARGUMENT ON MOTION TO DISMISS APPEAL.

THE APPEAL.

This is an appeal from the final decree, of the Circuit Court of the United States for the Northern District of Illinois, dismissing the special intervening petition of Edwin M. Keatley, as receiver of Amer-

ican Guaranty Company of Chicago under appointment of the Circuit Court of Kanawha County, West Virginia.

Edwin M. Keatley as such receiver had been given leave by such United States Circuit Court to file his special intervening petition for the sole purpose of protesting the *want* of jurisdiction of such Circuit Court as a Federal Court.

This appeal is taken under section 5 of the act of March 3rd, 1891.

The appeal is on the question of the jurisdiction of such Federal Court alone.

The record shows that the only question determined by such United States Circuit Court in the decree rendered and from which the appeal is taken is the *want* of the jurisdiction of the United States Circuit Court as a Federal Court.

The written opinion of the Circuit Judge duly authenticated and returned herewith clearly shows the only question determined below was the question of the jurisdiction of said United States Court as a Federal Court.

The petition for leave to appeal and the assignment of errors each shows that the sole question on this appeal is the question of the want of jurisdiction of the said United States Circuit Court as a Federal Court.

The order of the United States Circuit Judge allowing the appeal (and wherein such Circuit Judge, in effect, refused to certify the question of jurisdiction), shows that the appeal is taken on the question of jurisdiction alone.

The question of want of jurisdiction arises, as contended by appellant, as follows: That the said United States Circuit Court never in any way acquired jurisdiction over the person of the American Guaranty Company of Chicago, formerly a corporation of the state of West Virginia, defendant in the action in which this proceeding was brought:

(a) Because, prior to the commencement of such action in such United States Circuit Court, said American Guaranty Company of Chicago had been dissolved by a decree of the Circuit Court of Kanawha County, West Virginia, a court of competent jurisdiction, under the provisions of the Code of West Virginia, and a statutory receiver appointed to take charge of and distribute the assets of such corporation under the order of the court appointing such receiver.

That such decree of dissolution was obtained and such receiver appointed in a suit brought by a part of and joined in by all of the stockholders of such corporation; and, in such suit, the corporation itself, to-wit, the American Guaranty Company of Chicago, filed a consent answer.

(b) That the only jurisdiction, if any, ever acquired by the United States Circuit Court was by the voluntary appearance and consent answer of such dissolved corporation by its former president and secretary and by certain attorneys who signed as the solicitors of the defunct corporation.

(c) That at the time of the commencement of such action in the Circuit Court of United States such American Guaranty Company of Chicago by

virtue of such decree of dissolution and the appointment of such statutory receiver to take charge of its assets and wind up its affairs under the order of such Court so decreeing its dissolution and so appointing such receiver, by the provisions of the Code of West Virginia had ceased to exist, and its officers had no power or authority to appear in any court for the purpose of giving jurisdiction to such court for any purpose whatever. That such attorneys Gorham & Wales who appeared as solicitors for such American Guaranty Company and as such signed such consent answer, had no power or authority to appear for such corporation, and, if any such power or authority had ever been conferred upon such attorneys prior to the dissolution of such corporation such power and authority ceased at once upon such decree of dissolution.

Hence, the said United States Circuit Court never acquired any jurisdiction over the said American Guaranty Company of Chicago, and hence had no jurisdiction of the assets of such corporation.

Because of the premises the orders made and entered in said United States Circuit Court are, and each and all of them, *coram non judice* void and without effect.

OBJECT OF SPECIAL INTERVENTION OF KEATLEY.

The sole purpose and object of special intervenor Edwin M. Keatley as such receiver, the appellant in this action, was and is to raise such question of the

want of jurisdiction of the United States Circuit Court as a Federal Court.

For such purpose Edwin M. Keatley, as such receiver, petitioned the said United States Circuit Court and moved for leave to intervene.

For such purpose alone the United States Circuit Court allowed such receiver, the appellant herein, to file his intervening petition in such action.

On the hearing below, the United States Circuit Court decided and found that it had jurisdiction of the person of the American Guaranty Company and then entered the decree dismissing the intervening petition of Edwin M. Keatley.

From such decree, on the grounds stated, the appeal is taken to this Court.

Because the statement of facts made by attorney for Receiver Potter is deemed insufficient, we make the following:

STATEMENT OF FACTS.

(*All record references are to the printed pages.*)

CODE OF WEST VIRGINIA.

Sections 57, 58 and 59 of the Code of West Virginia, are printed on pages 5, 6 and 7 of the brief of Mr. Levy Mayer, attorney for Edwin A. Potter, receiver.

Section 57, of such Code, provides the method by which the Circuit Court of the County in which the principal office or place of business of a West

Virginia corporation is situated may dissolve such corporation at the suit of a stock-holder or stock-holders owning one-third of the capital stock of such corporation.

Section 58 provides: "When a corporation * * * is dissolved or before its * * * dissolution, upon sufficient cause being shown therefor, such court, as is mentioned in the preceding section, may, on application of a creditor or stock-holder, appoint one or more persons *to be receivers to take charge of and administer its assets;* and whether such receiver be appointed or not, may make such orders and decrees and award such injunctions in the cause as justice and equity may require."

Section 59 declares who shall take charge of and administer the property and assets of a dissolved corporation both when no receiver has been appointed and when a receiver has been appointed, viz:

I. *WHEN NO RECEIVER HAS BEEN APPOINTED.*

> "Sec. 59. When a corporation shall expire or be dissolved, its property and assets, shall, under the order and direction of the Board of Directors then in office, * * * be subject to the payment of the liabilities of the corporation, and the expenses of winding up its affairs, and the surplus, if any, then remaining to distribution among the stock-holders according to their respective interests. And (to that end) suits may be brought, continued or defended, the property, real or personal, of the corporation be conveyed or transferred, etc."

II. *WHERE A RECEIVER HAS BEEN APPOINTED.*

> "Sec. 59. When a corporation shall * * * expire or be dissolved, its property and assets, shall, under the order and direction of * * * the receiver or receivers appointed for the purpose by such Circuit Court as is mentioned in the 57th section of this chapter, be subject to the payment of the liabilities of the corporation, and the expenses of winding up its affairs, and the surplus, if any, then remaining, to distribution among the stock-holders according to their interests. And (to that end) suits may be brought, continued or defended, the property, real or personal, of the corporation be conveyed or transferred, etc."

In the first case where no receiver has been appointed of a dissolved corporation suits may be brought etc. by order of the Board of Directors.

In the second case where a receiver has been appointed of a dissolved corporation suits may be brought etc. under the direction of such receiver or receivers.

SUIT IN EQUITY FOR DISSOLUTION AND APPOINTMENT OF RECEIVER IN KANAWHA COUNTY CIRCUIT COURT, WEST VIRGINIA. REC. PP. 23-51; 139-162.

On February 1, 1909, the above named Carrie Rebecca Furey, as executrix of the last will and testament of Charles La Tour Furey, deceased, and in her own right, and Caroline La Tour Furey by her next friend, as complainants, filed a bill in the Circuit Court of Kanawha County, West Virginia, against the American Guaranty Company of Chicago, defendant.

In such bill it was, in substance, alleged: "That Charles L. Furey died testate in Chicago, Illinois, November 29, 1908; that his last will and testament was duly admitted to probate in Cook County Probate Court, Illinois, December 8, 1908, that on the same day letters testamentary duly issued out of such court to Carrie Rebecca Furey; that she at once duly qualified as sole executrix and is still acting as such. That by such will there was devised to Carrie Rebecca Furey and Caroline La Tour Furey, surviving widow and daughter, respectively, of such testator, all his estate share and share alike; that both complainants lived and still live at Chicago, Illinois."

"That at the time of his death said Furey owned 602 shares, out of 962 shares then and prior thereto issued, of the capital stock of the American Guaranty Company of Chicago; that the remaining 360 shares of such capital stock were then and there owned, and for several years prior had been owned, 260 shares by Lewis W. Pitcher and 100 shares by James L. Bigelow. That said capital stock of both Pitcher and Bigelow had been held for several years by such American Guaranty Company as security for loans made by such company to said Pitcher & Bigelow. That then and there and for several years prior said Pitcher and Bigelow had been Secretary and Treasurer respectively of said American Guaranty Company."

"That such Guaranty Company of Chicago was organized under the laws of West Virginia July, 1892; that since April 13, 1901, the authorized capital stock of such corporation has been and is 5,000 shares of the par value of $100 each or $500,000; that, by the

charter the corporate existence of such corporation will end January 1, 1942; that among the objects for which said Guaranty Company was incorporated was, to enter into contracts with individuals and firms by which after a certain number of payments of certain amounts at stated times, the Guaranty Company undertook to pay a certain stated income for a certain number of years; that the principal office of such Guaranty Company ever since its incorporation has been and is in Charleston, Kanawha County, West Virginia; that its administrative offices have been and are in Chicago, Illinois. Rec. p. 25.

That on December 15, 1908, said American Guaranty Company had and now has outstanding and in full force and effect, contracts of a total nominal value or possible contingent amount aggregating $15,825,000 dollars; that the amount of said contracts vary from a minimum of $1,000 to a maximum of $10,000 upon the dates of their maturity.

That said contracts mature at periods of ten, fifteen and twenty years from their respective dates of their issue.

That there are about 6,500 of said contracts now outstanding which are scattered throughout the *United States, Canada and Mexico.*

That said contracts are denominated "investment," "service" and "income" contracts; that sample copies of same are found in exhibits C, D and E respectively attached to such bill.

That said investment and service contracts provide by their terms that, as security for the redemption of the same, said Guaranty Company shall keep

in trust moneys and other securities to such an amount, as shall at the time equal in the aggregate seventy-five per cent of the cash value of said contracts etc.

That pursant to the provisions so contained in said contracts, said Guaranty Company did deposit and now has on deposit a fund consisting of cash and other securities aggregating over $500,000; that in addition to said fund said Guaranty Company now has assets consisting of cash, securities, bills receivable, loans to contract holders, and other assets all estimated to be worth over $750,000.

That on June 23, 1903, the said Charles La Tour Furey being then and there vice-president of such Guaranty Company, at a meeting of the Board of Directors the following resolution was duly and unanimously adopted:

> "Resolved, the Vice-president, by virtue of his office is hereby constituted chairman of the Board of Directors, and is to assume and perform all the duties of the president, it being also understood that the vice-president shall take upon himself the duty of generally supervising all details and operation of the business." Rec. p. 27.

That pursuant to said resolution and in compliance therewith said Charles La Tour Furey as such Vice-president, did continuously from such date until the time of his death, act as chairman of the Board of Directors of said Guaranty Company and assumed and performed all the duties of President thereof. Rec. p. 27.

That under the administration of said Vice-president, who was an expert in the business of such Guaranty Company, the Guaranty Company increased from the total outstanding value of its contracts of $3,000,000 to $15,825,000 at the time of his death; that such increase was due largely to the expert knowledge and ability of said Vice-president.

That neither Carrie Rebecca Furey nor her daughter have any knowledge of such business of such Guaranty Company; that no one can be found to take the place of the Vice-president, in the management of such Company, who has his ability.

"That in view of the premises your oratrices and said Pitcher and Bigelow, together owning all of the issued stock of said Guaranty Company, have concluded that it is to the best interests of said Company, its stockholders and all of its contract holders, that said company shall be dissolved and its business and affairs wound up and its assets liquidated and distributed in accordance with the rights of those entitled thereto; that other than its obligations on said contracts, said Guaranty Company has no liabilities whatever, except to a nominal amount for current expenses, and except what may be owing for commissions to said Charles La Tour Furey and agents; that said Guaranty Company has no liabilities of any kind in the state of West Virginia other than to 48 contract holders, none of whose contracts has matured and upon none of which is said Guaranty Company in any way in default, and the total surrender or cash value of which does not exceed $9,751.44."

"That all of the property and effects of said Guaranty Company are in said city of Chicago, except a few cash balances in little more than nominal amounts due to said Guaranty Com-

pany from about 15 banks outside of Chicago which have been the collecting agents of said Guaranty Company."

"9. That your oratrices, constituting and being more than one-third in interest of the stockholders of said Guaranty Company, desire to wind up its affairs, and with said Pitcher and Bigelow, who also desire to wind up its affairs, constitute the entire interest of the stockholders of said Company.

"Wherefore, the premises considered, your oratrices make said American Guaranty Company of Chicago a party defendant hereto and pray that process, in due form, returnable as provided by law, may issue against it; * * * that this court decree a dissolution of said American Guaranty Company of Chicago, and make such orders and decrees, and award such injunctions in the cause as justice and equity may require; and appoint one or more persons to be receivers to *take charge of and administer the assets of said defendant company*, and grant such other and appropriate relief as may be proper in the premises." Rec. pp. 27, 28.

That said bill was properly verified and signed by Hal. C. Bangs (of the firm of which Mr. Levy Mayer, attorney herein, is the head), Brown, Jackson & Knight, solicitors for complainants. Rec. p. 29.

At the same instant the American Guaranty Company of Chicago, defendant, appeared and filed the following consent answer.

"(Title.) The American Guaranty Company of Chicago, defendant in the above entitled cause, hereby enters its appearance herein and consents to the granting of the prayer contained in said bill of complaint and to the entry of a decree of dissolution of said American Guaranty

Company of Chicago, and to the appointment of a receiver to take charge of and administer its assets, and to the entry of such other orders and decrees and to the awarding of such injunctions in the case as equity and justice may require.

(Signed) American Guaranty Company of Chicago.

By Frederick M. Steele, President.

Angus W. McDonald, Sol. for American Guaranty Company."

Attest:

L. W. Pitcher,

(Seal.) Sec'y.

Rec. p. 29.

That at the same instant then and there appeared Lewis W. Pitcher and James L. Bigelow and filed the following joinder:

"(Title.) Lewis W. Pitcher and James L. Bigelow join as complainants in the above and foregoing bill of complaint and request that the prayer thereof be granted.

(Signed) Lewis W. Pitcher.
James L. Bigelow.

By Hal C. Bangs,
Their Attorney." Rec. p. 29.

And thereupon and at once a decree of dissolution was duly made and entered by such Court, by which it was thereby:

"Ordered, adjudged and decreed that the said American Guaranty Company, be, and it hereby is dissolved, and V. L. Black of Charleston, West Virginia, is hereby *appointed receiver*

of all and singular the property and assets of the American Guaranty Company of every description within the jurisdiction of this court, to have and to hold and to administer the same under the order and direction of this court. All the creditors of said American Guaranty Company are hereby enjoined from interfering or meddling with any of the property of said American Guaranty Company. The receiver is hereby directed to take all and such steps as may be necessary to secure possession of the property of the American Guaranty Company within the jurisdiction of this Court and to apply to this Court for any and such further directions as to him may seem necessary."

"But before entering upon the discharge of his duties in this behalf said receiver shall give bond with approved security before the clerk of this court in the penalty of $5,000 conditioned according to law." Rec. p. 53.

That such bond then and there already prepared was at once submitted to such Court, approved and filed.

ACTION IN UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS. Rec. pp. 1-8; 239-246.

On February 2, 1909, the same Carrie Rebecca Furey as such executrix of said last will and testament of Charles La Tour Furey, deceased, and in her own right, and said Carline La Tour Furey, complainants, filed a bill in the United States Circuit Court, Northern District of Illinois, against American Guaranty Company of Chicago (such dissolved corporation) defendant.

That in such bill it was alleged as ground of jurisdiction of such Federal Court:

"That at the time of the death of said Charles La Tour Furey, and for many years continuously theretofore and continuously since, your orators were, have been and now are citizens of said State of Illinois, and residents of said city of Chicago; that said American Guaranty Company of Chicago, is a corporation duly organized and doing business under and by virtue of the laws of the State of West Virginia, and is not incorporated under the laws of any other state, territory or country; that it is a citizen of the State of West Virginia and of no other state, territory or country; that it has heretofore duly complied with the laws of the State of Illinois governing foreign corporations and is duly licensed and authorized to do business in said State; that the matters in dispute in this cause exceed, exclusive of interest and costs, the sum or value of two thousand dollars." Rec. p. 2.

The balance of such bill was substantially the same as the bill filed in West Virginia except the following:

"5. That on or about March 10, 1906, said Guaranty Company duly entered into a contract with said Charles La Tour Furey, under and by the terms of which said Guaranty Company agreed to pay him certain commissions as compensation for services to be rendered by him to said Guaranty Company, which services were by him duly rendered and performed; that under and by the terms of said contract said Guaranty Company became and now is indebted to said Carrie Rebecca Furey, as executrix as aforesaid, in the sum of $14,798.42, which sum is now due and owing by said Guaranty Company to said executrix as such, for such services." Rec. p. 3.

"11. That on February 1, 1909, in accordance with the statutes of the state of West Vir-

ginia authorizing the same, a bill in chancery was filed in the Circuit Court of Kanawha County, West Virginia, in which the principal office or place of business of said Guaranty Company is situated, praying that the court decree a dissolution of said Guaranty Company and to make such other orders and decrees as justice and equity may require, and in said bill, so filed, said Pitcher and Bigelow duly intervened and joined as plaintiffs, and joined in the allegations and prayer of said bill; that said Guaranty Company duly entered its appearance to said bill; that on said February 1, 1909, said Circuit Court of Kanawha County, having full jurisdiction of all of the parties to and subject-matter of said bill, duly entered a decree dissolving said American Guaranty Company of Chicago, which decree is now in full force and effect, unmodified, unreversed and unappealed from; and also appointed a receiver, who has duly qualified as such, of all of said Guaranty Company's assets and effects located within said State of West Virginia; that a true copy of said proceedings in said Circuit Court of Kanawha County is herewith brought into court.

"12. That in consequence of the entry of said decree of dissolution, said American Guaranty Company of Chicago has become a trustee, for its creditors and stockholders, of all of its property, assets and effects; that the receiver so as aforesaid appointed by said Circuit Court of Kanawha County has no jurisdiction outside of the State of West Virginia and has no authority or power outside of said State of West Virginia to collect or enforce collection of all or any of said property, assets and effects; that all of said property, assets and effects, as hereinbefore stated, except some nominal amounts held by some few banks in the progress of collection are located within said

city of Chicago and within the jurisdiction of this court; that it is necessary to ascertain what, if anything is owing to any and all of said 6,500 contract-holders, anything in said fund so on deposit with said Royal Trust Company of Chicago shall be alloted or apportioned on any and all of said contracts; that the surrender value of said contracts is at least $1,000,000, and that some of the holders of said contracts threaten as your orators are informed and believe and state the fact to be that they will commence suits by attachment or otherwise against said Guaranty Company and levy upon its said property, assets and effects so situated in said State of Illinois, and that by means of such attachments, priorities will be secured by some of the contract holders over others; that interminable, complicated and costly litigation will ensue and the property, assets and effects of said Guaranty Company will be wasted and destroyed to such a degree as to make the same utterly inadequate and insufficient, unless such property, assets and effects are taken possession of by a receiver to be appointed by this court to conserve and distribute the estate of said Guaranty Company among those entitled thereto.

"13. That your orators file this, their bill of complaint, not only on behalf of themselves but also on behalf of all other stockholders of said Guaranty Company, and of all other creditors thereof who may ask and secure leave to intervene herein and become parties hereto.

In Consideration Whereof and for as much as your orators are remediless in the premises at or by the strict rules of the common law and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable, etc." Rec. pp. 6, 7.

Then follows the general prayer for accounting and the appointment of a chancery receiver to take

charge of all the property, assets and effects of every description of said defendant, etc.

That at the same time there was filed in said court the following:

"In the Circuit Court of the United States in and for the Northern District of Illinois, Eastern Division thereof.

Carrie Rebecca Furey, as Executrix of the Last Will and Testament of Charles La Tour Furey, Deceased, and in Her Own Right, and Caroline La Tour Furey, Complainants,

vs.

American Guaranty Company of Chicago, Defendant.

Now comes said American Guaranty Company of Chicago, and confesses each and all of the allegations contained in the bill of complaint filed herein to be true, and that said complainants are entitled to the relief therein prayed, and consents to the appointment forthwith by this Honorable Court of a receiver of all the property, assets and effects of every description of said American Guaranty Company of Chicago, and to the entry of such further orders and decrees from time to time in the premises as the court may deem proper.

American Guaranty Company
of Chicago,

By Frederick M. Steele,
President.

American Guaranty Company
of Chicago,

By Gorham & Wales,

(Corporate Seal.) Its Solicitors.

Attest: L. W. Pitcher, Sec'y."

Rec. pp. 253, 254, 56.

And at the same time there was filed in such court the following:

"In the Circuit Court of the United States in and for the Northern District of Illinois, East-end Division thereof.

Carrie Rebecca Furey, as Executrix of the Last Will and Testament of Charles La Tour Furey, Deceased, and in Her Own Right, and Caroline La Tour Furey, Complainants,

vs.

American Guaranty Company of Chicago, Defendant.

Now come Lewis W. Pitcher and James L. Bigelow, the owners respectively of two hundred and sixty (260) shares and one hundred (100) shares of the capital stock of said American Guaranty Company of Chicago, as alleged in the bill of complaint herein, and consent to said Honorable Court granting the relief prayed for in said bill, and to the appointment forthwith of a receiver of all the property, assets and effects of every description of said American Guaranty Company of Chicago.

Lewis W. Pitcher,
James L. Bigelow."

Rec. p. 254

That at the same instant there was then and there duly made and entered the order appointing

Edwin A. Potter "receiver of this Court of all and singular the property of said American Guaranty Company of Chicago of every description and of all moneys, claims, in action, credits, bonds, stocks and other assets of every kind and of all other property, real, personal and mixed, held or possessed by said Company, or to which said Company is entitled, or in which it has any interest, to have and to hold the same as an offi-

cer of and under the orders and directions of this Court. * * And the said American Guaranty Company of Chicago, and its officers are hereby directed immediately to execute and deliver to the said receiver a deed or deeds of all real estate now owned or possessed by said Company, and transfers and assignments of all the property, assets and effects of said Company."

And it was further provided in said order:

"Said receiver is hereby required to file with the clerk of the court a proper bond in the penal sum of $50,000 with the Empire State Surety Company of New York as surety, and said receiver now here appears in open court and accepts his said appointment as receiver herein, and now here presents said bond in the penal sum of $50,000 with said surety, which said bond the court now here finds to be proper in form and to have been properly executed, and now here approves the same." Rec. pp. 57, 58, 254-256.

That on the 6th day of February, 1909, a notice was given to Levy Mayer, Esq., solicitor for receiver of American Guaranty Company etc. of a motion to be made before United States Circuit Judge appointing such receiver, for leave for the Contract-holders Committee to intervene in such action in the Federal Court as one of the defendants, which notice was signed by Gorham & Wales, solicitors for etc. Rec. p. 60.

That on the 8th day of February, 1909, there was filed a petition by the Contract-holders Committee for leave to intervene and to be made parties in such suit in United States Circuit Court, which petition was signed by Gorham & Wales, their solicitors. Rec. p. 59.

And on such 8th day of February, 1909, leave was given to said Contract-holders Committee to intervene in such action. Rec. p. 61.

That on the 26th day of March, 1909, Edwin A. Potter as such receiver filed his report in said United States Circuit Court. Rec. pp. 167-171.

That from such report it appears that said Guaranty Company is and was largely insolvent. Rec. p. 170.

INTERVENING PETITION OF GILLIAM. Rec. p. 183.

That on the 22nd day of September A. D. 1909, in the Circuit Court of Kanawha County, West Virginia, leave being granted, the petition of W. R. Gilliam on behalf of himself and other contract-holders and creditors of the American Guaranty Company was filed in the case of Carrie Rebecca Furey, executrix, et al. against the American Guaranty Company pending in said court. Rec. pp. 183-208.

That said petition alleges: "The incorporation of said Guaranty Company, its capital stock and the owners thereof, the place of its principal, and, its administrative offices, as alleged in such bill in Kanawha County Circuit Court, and, further alleged that said Gilliam was the owner of five contracts issued by said Guaranty Company not matured, of the aggregate maturity value of $12,500; that he represented 86 other contract-holders who held contracts of the aggregate amount maturity value of more than $450,000.

"That said petitioner is also a creditor of said defendant corporation in the sum and amount of $49,682 because of his right and interest in renewal commissions agreed to be paid to him by said American Guaranty Company as therein set forth. That said renewal commissions arise out of 1508 outstanding contracts then in force held by that many contract holders in the state of Minnesota of maturity value of $3,846,000 which were secured for such Guaranty Company by said Gilliam while acting as agent in the state of Minnesota. That is, nearly one-fourth of all the outstanding contracts aggregating about one-fourth of the entire maturity value of all outstanding contracts were secured, by said W. R. Gilliam, in the state of Minnesota.

That during several years previously and at the time of the dissolution of such American Guaranty Company, the said Lewis W. Pitcher and James L. Bigelow (and Charles La Tour Furey until his death), Frederick M. Steele, William George, William B. Hill, Byron M. Fellows, Frank Backus and John T. Powers constituted the Board of Directors of said American Guaranty Company; only three of whom, including such Furey, deceased, were stockholders in said American Guaranty Company of Chicago.

And, then alleges the filing of the bill in said Kanawha Circuit Court by said Carrie Rebecca Furey, as executrix etc. et al. and all the proceedings in such court up to the time of the appointment of receiver Black and his qualification, and, also alleges the proceedings in the United States Circuit Court in Chicago and the appointment of the receiver in such court, and then alleges the following:

"That by said decree of dissolution, the said defendant corporation has ceased to exist as such and does not continue for the purpose of winding up its affairs, nor are its present officers competent to act in any way, for or on its behalf, nor is it capable of suing or being sued, for the reasons that the appointment of such receiver under the laws of this state, displaces and annuls the powers of said corporation and its officers in toto, and subjects all its acts and powers to the discretion alone of this Honorable Court." Rec. pp. 191, 192.

And then suggests in such petition, the reasons why the said V. L. Black under the rules of said court in West Virginia, ought not to be receiver, prays for his removal and the appointment of another receiver with enlarged powers. Rec. pp. 179-208.

And thereupon on said date the Circuit Court of Kanawha County by its order and decree removed said V. L. Black as such receiver and appointed in his place and stead Edwin M. Keatley. Rec. pp. 179-182.

In such order and decree is the following:

"It is, therefore, adjudged, ordered and decreed that V. L. Black, who was, by a decree entered in this cause on the first day of February, 1909, appointed Receiver of the defendant, American Guaranty Company, be, and he is hereby discharged as such Receiver, and that Edwin M. Keatley is hereby appointed Receiver of the said American Guaranty Company to take custody, possession and control of all and singular the property and assets of the said American Guaranty Company wherever the same may be situated or located, whether in this state or in some other state or territory, and hold the same subject to the provisions of the statutes of West Virginia, under the orders of this Court, and to

the payment of the liabilities of the corporation and the expenses of winding up its affairs, and the surplus, if any, to distribute among the stockholders of the said American Guaranty Company according to their respective interests as the Court may hereafter direct; and the said Receiver is hereby given power and authority to institute and prosecute to final judgment and decree any and all needful actions at law, suits in equity or other proceedings which may be necessary to bring under his jurisdiction and bring into his possession, custody and control any of said property and assets wherever the same may be found; and,

He shall have further power and authority to file any proper petition, demurrer, answer or other pleading, or make such motions as may be necessary in any suit now pending in any state or territory or which may hereafter be instituted in any state or territory, concerning the business, property or assets of said American Guaranty Company, for the purpose of bringing under his possession, control and custody all of the said property and assets and to this end and for the purpose of instituting any such suits or actions for filing any such pleadings and the making of any such motions or interventions, the said Receiver is authorized to employ counsel in this state or in any other state or territory in which any of such property may be situated, if the title and claim of the said Receiver thereto shall be in any way contested or obstructed, and he shall from time to time, report his proceedings hereunder, to the Court; and

The defendant, American Guaranty Company, under the provisions of Section 59 of Chapter 53 of the Code of West Virginia, is hereby ordered and directed to make, execute and deliver an apt and proper deed, conveyance, transfer or assignment conveying to the said Receiver this

day appointed, all of the property and assets of said American Guaranty Company, wherever the same may be situate."

"But before taking any property or assets into his possession or control under this decree, or acting hereunder, the said Receiver shall execute a bond in the penalty of Two Hundred and Fifty Thousand Dollars, with security to be approved by this Court, conditioned that the said Receiver will faithfully discharge his duties as such Receiver and will faithfully account for and pay over all property and assets which may come into his hands as such Receiver." Rec. p. 181.

"In the event that the American Guaranty Company shall fail to file with the papers in this cause, within fifteen days (15) from this date, an apt and proper deed, conveyance, transfer or assignment, conveying to the Receiver this day appointed, all of the property and assets of said American Guaranty Company, wherever the same may be situated, then that T. S. Clark, who is hereby appointed a special commissioner for that purpose, shall make, execute, acknowledge and deliver for record for and on behalf of the said American Guaranty Company, an apt and proper deed, conveyance, transfer or assignment, conveying to the said Receiver this day appointed, all of the property and assets of said American Guaranty Company, wherever the same may be situated, but before making any such deed said special commissioner shall submit the same to the Court for approval, after giving local counsel for plaintiffs reasonable notice thereof." Rec. p. 182.

That the said Edwin M. Keatley duly appeared on the 27th day of September and duly filed his bond for $250,000 in the Circuit Court of Kanawha County, which bond was acknowledged before and approved by the said S. C. Burdett, Judge of said court on such date

DEED TO EDWIN M. KEATLEY.

That on the 9th day of October A. D. 1909, the said T. S. Clark, special Commissioner, made a deed and assignment of all the property and assets real and personal of the said American Guaranty Company of Chicago to Edwin M. Keatley. Rec. p. 136.

INTERVENING PETITION OF KEATLEY.

That on the 27th day of October, A. D. 1909, the said Edwin M. Keatley as such receiver, presented his special intervening petition to the United States Circuit Court of Northern District of Illinois and asked leave to intervene in said action so commenced by Carrie Rebecca Furey as executrix et al. versus American Guaranty Company of Chicago. And, on such date the following order was made and entered in such Court:

> "Carrie Rebecca Furey, Executrix of the Last Will and Testament of Charles L Tour Furey, Deceased, et al.,
>
> vs.
>
> American Guaranty Company of Chicago.
>
> Now come the parties by their solicitors and now comes on to be heard the motion of Edwin M. Keatley, the receiver of the American Guaranty Company of Chicago heretofore appointed by the Circuit Court of Kanawha County, West Virginia, for leave to file his intervening petition herein, and the court after hearing the arguments of counsel and being fully advised in in the premises, sustains said motion.
>
> It is thereupon ordered that leave be, and the same is hereby given said receiver to file his intervening petition instanter, and leave is given

respondents to file their respective answers instanter, and it is further ordered that the replication to said answers be filed within five days from this date.

And thereupon said intervening petitioner is given one week in which to file his brief upon the question of jurisdiction; the respondents to file their briefs within one week thereafter, and the said intervenor has three days thereafter to reply. Rec. p. 215.

INTERVENING PETITION OF EDWIN M. KEATLEY. R. pp. 135-214.

"In the Circuit Court of the United States in and for the Northern District of Illinois, Eastern Division thereof. In Equity. No. 29336.
Carrie Rebecca Furey et al., Complainants,

vs.

American Guaranty Company of Chicago, Defendant.

"Petition of Edwin M. Keatley, of Charleston, West Virginia, for leave to intervene specially in said action, as receiver of said defendant corporation appointed by the Circuit Court of Kanawha County, West Virginia.

To the Honorable, the Judges of the Circuit Court of the United States in and for the Northern District of Illinois, Eastern Division Thereof:

Your petitioner, Edwin M. Keatley, respectfully represents to your Honors and alleges:

First: That your petitioner is, and for more than ten years last past, has been a citizen and resident of the State of West Virginia, and that the above named complainants are, as pe-

titioner is informed and believes, and for several years last past have been citizens and residents of the State of Illinois.

That the above named defendant, American Guaranty Company of Chicago, was prior to the first day of February, A. D. 1909, a corporation organized, created and existing under the laws of the State of West Virginia, with its principal office in the City of Charleston, Kanawha County, in the State of West Virginia, and its administrative offices in the City of Chicago, State of Illinois, and was a citizen and resident of the said State of West Virginia." Rec. pp. 128, 129.

That thereafter said petitioner alleges; the proceedings in the Circuit Court of Kanawha County, from the filing of the bill to the appointment of V. L. Black, as such receiver, giving the substance of what the said bill contains. And further, alleges the proceedings in the United States Circuit Court of Chicago up to and including the appointment of Edwin A. Potter, receiver.

And thereafter in such petition he alleges the appearance in said Circuit Court of Kanawha County of W. R. Gilliam, the filing of his petition, the substance thereof and all proceedings thereunder to the removal of receiver Black and the appointment of Keatley, the giving of his bond and the execution of the deed by Commissioner Clark, and the approval of such deed by the Circuit Court of Kanawha County, and continuing such petitioner alleges:

"Third. And your petitioner further shows that he is advised by counsel and therefore alleges that the judgment and decree of said Circuit Court for Kanawha County, West Virginia, dissolving and declaring at an end the incorpo-

ration of said American Guaranty Company of Chicago as a corporation under the laws of said state, so as aforesaid made and entered on said 1st day of February, A. D. 1909, was fully authorized by the provisions of sections 57 and 58 of Cahpter 53 of the Code of West Virginia, and forever ended and determined the corporate existence of said defendant company and deprived it absolutely and entirely of any power or authority to act in any manner whatsoever as a corporation thereafter, and forever ended the authority of its officers to act for or in its behalf, except as expressly provided by section 59 of Chapter 53 of the Code of said State of West Virginia, whereby, under the circumstances therein set out, officers of such corporation are permitted to act for a limited time so far only as may be necessary in winding up the affairs of the corporation, and that, as in the said case in said Kanawha Circuit Court, where a receiver of the said dissolved corporation is appointed for the purpose of winding up the corporate business and affairs, the officers of said corporation are absolutely deprived of all authority to act, except as directed by the said court, or requested by the said receiver. And said section 59 further provides that the property and assets of the corporation shall, under the order and direction of the receiver appointed by such Circuit Court for the purpose, as is mentioned in the 57th section of said chapter 53 of the Code of West Virginia, be subjected to the payment of the liabilities of the corporation and the expenses of winding up its affairs, and the surplus, if any, then remaining, to distribution among the stockholders according to their respective interests.

That, therefore, the said dissolution of said American Guaranty Company of Chicago, by said decree of said Circuit Court of Kanawha County, West Virginia, so made and entered on the 1st day of February, 1909, and the appointment of

said Black as such receiver, in and of itself, without the restraining order, also then and there issued, took from said corporation and its Board of Directors, and all its officers, every power, franchise, right, and authority to appear for said corporation in this Honorable Court and submit to the jurisdiction thereof in this pending action, or to give to this Honorable Court jurisdiction herein, either over the person of said defendant company or the subject matter of winding up its affairs by and through its own receiver apointed in this cause upon said 2nd day of February, A. D. 1909.

"That the said defendant corporation upon dissolution as hereinbefore mentioned, under the laws of West Virginia, the state of the creation of said defendant, could only finish its business, conserve and marshal its assets, pay and discharge its lawful indebtedness, and distribute and dispose of its surplus funds, if any, by and through the direction, orders, judgments and decrees of said Circurit Court of Kanawha County, West Virginia, and that any attempt so to do, or any interference with the property, business, or assets of said defendant corporation, by any other court wherever situate, except ancillary to and upon the request and authority of said court of original jurisdiction, would be wholly unwarranted and without competent jurisdiction, and all the acts, orders, directions, judgments and decrees of such other court, and all its proceedings would in that respect be *coram non judice* and without right.

"And you petitioner further shows, that he is advised by counsel and therefore alleges, that the pretended voluntary appearance in this Honorable Court and in this cause by said defendant American Guaranty Company of Chicago on said second day of February, A. D. 1909, by and through its attorneys Gorham & Wales, and its voluntary answer to said bill, and its consent to

the appointment of receiver herein, when said corporation had been by the same parties, or in the same interests procured to be declared dissolved, and a receiver therefor so appointed in said state of West Virginia, on said 1st day of February, A. D. 1909, gave to this Honorable Court no jurisdiction whatever, but was in fact a fraud upon this Honorable Court, and all proceedings subsequently taken herein are without right, and in truth and in law and fact, null and void.

"That by virtue of the order so made by said Circuit Court of Kanawha County, West Virginia, appointing your petitioner receiver of said Court for the property and assets of said defendant American Guaranty Company of Chicago, it becomes the duty of your petitioner to ask permission of this Honorable Court to intervene specially in this action, not acknowledging, but on the contrary, protesting the jurisdiction of this Honorable Court in the premises, and to ask that this Honorable Court permit to be filed herein, this petition for the purpose aforesaid, to the end that after proper answer the issues framed may be heard in this Honorable Court and finally determined, and that the order and decree of this Honorable Court be made and entered, as the rules of equity shall rquire.

And your petitioner will ever pray, etc.

Edwin M. Keatley,
Petitioner.

By F. W. Houghton,
His Attorney.

Thos. H. Gill, F. W. Houghton, George B. Edgerton, Chilton, MacCorkle & Chilton, Sol's." Rec. pp. 133-135.

(Such petition was duly verified.)

PRETENDED ANSWER OF AMERICAN GUARANTY COMPANY TO PETITION OF EDWIN M. KEATLEY. Rec. 216-226. Exhibits pp. 226-278.

That Edwin A. Potter and the Contract-holders Committee each adopted the pretended answer of the American Guaranty Company of Chicago. Rec. p. 279.

That such adopted answer of Edwin A. Potter, as receiver, and Contract-holders' Committee, to the petition of Keatley, after certain recitals, admissions and denials, alleges: "The resolution adopted by the members of the executive committee on January 30, 1909, by virtue of which Gorham & Wales appeared in behalf of said defunct and dissolved American Guaranty Company of Chicago on February 2, 1909, in the United States Circuit Court. Rec. p. 218.

That in such answer to petition of Keatley so adopted by said Edwin A. Potter, receiver, and Contract-holders' Committee is the following:

> "That under and in accordance with the statutes of the state of West Virginia in such case made and provided, suits may be brought, continued or defended, and all lawful acts done in the corporate name in like manner or like effect as before the dissolution of said corporation so far as shall be necessary or proper for collecting the debts and claims due the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto; that the bill filed herein is for the purpose of collecting debts and claims due to this defendant, and for converting its property and assets into money and

for protecting and prosecuting its rights and enforcing its liabilities and paying over and distributing its properties and assets and the proceeds thereof to those entitled thereto, and that under and in accordance with said statutes of West Virginia, the bill herein against this defendant may be defended in the corporate name, and that for the purpose of defending the suit herein and carrying out the orders of this court, this defendant continues in existence as a corporation for the purposes mentioned; and notwithstanding the decree of dissolution heretofore entered in the Circuit Court of Kanawha County, West Virginia, on the 1st day of February, 1909, this defendant under the statutes of West Virginia, and under the law and practice of this court, continues in existence as a corporation of the state of West Virginia, and is a citizen of said state of West Virginia, for the purpose of defending the suit herein and for the collection and distribution of its assets among those entitled thereto under and in accordance with the orders of this court, and as such continues and is a resident of the state of West Virginia and of no other state whatsoever." Rec. pp. 219, 220.

And such answer contains the following allegations:

"3. This defendant admits that the judgment and decree of said Circuit Court of Kanawha County, West Virginia, entered on February 1, 1909, decreeing the dissolution of this defendant was fully authorized by the statutes of West Virginia; but this defendant denies that the said decree of dissolution in accordance with the statutes of West Virginia, deprives it absolutely and entirely of any power or authority to act in any manner as a corporation thereafter, but on the contrary asserts and alleges that under and in accordance with the statutes of the

state of West Virginia herein above referred to and the law, this defendant maintained an existence for certain purposes, and could defend suits and do all lawful acts under the corporate seal and in its corporate name for the purpose of collecting debts and claims due to it, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities and paying over and distributing its properties and assets and the proceeds thereof to those entitled thereto, and also for other purposes.

"And this defendant denies that the appointment of V. L. Black as receiver of the assets of this defendant by order of said Circuit Court of Kanawha County, entered on February 1, 1909, in any way deprived said corporation or its officers to act or to defend suits brought against it in its corporate name, and this defendant denies that the appointment of said Black as such receiver, took from this defendant and its Board of Directors and its officers, every power, franchise, right and authority to appear for said corporation in this Honorable Court, and to submit to the jurisdiction thereof in this pending action or to give this Honorable Court jurisdiction herein over the person of this defendant, or the subject-matter and winding up its affairs by and through the receiver appointed herein, but on the contrary this defendant expressly alleges and asserts under and in accordance with the provisions of the statutes of West Virginia in such case made and provided and the law, this defendant was authorized to appear under its corporate name and defend the proceedings herein instituted, and to consent thereto, and further that under and in accordance with the resolution duly adopted by its executive committee prior to the decree of dissolution entered in said Circuit Court of Kanawha County, this defendant duly authorized and directed its attorneys here-

in to appear for it and on its behalf, and to consent to the relief prayed in the bill filed herein, to take such other and further steps, acts and proceedings as to them might seem proper."

"And this defendant further denies that the taking of the jurisdiction by this Honorable Court and the appointing of the receiver herein, and the taking possession of the property and assets of this defendant by this Honorable Court was unwarranted and without jurisdiction, and on the contrary this defendant asserts and alleges that the acts and proceedings of this Honorable Court were with full jurisdiction of all the parties hereto, and the subject matter thereof, and that all the proceedings and acts taken in this Honorable Court have been with full jurisdiction in the premises, and this defendant denies that the appearance by this defendant in this Honorable Court by Gorham & Wales, its solicitors, was a fraud upon this Honorable Court, and that all proceedings subsequently taken herein are null and void, but on the contrary expressly asserts and alleges that this defendant with full authority directed the entry of its appearance herein and appeared herein and consented to the relief herein prayed, and that such appearance and consent were duly authorized both by resolution of its executive committee adopted prior to the decree of dissolution herein, and by the statutes of the state of West Virginia, authorizing dissolved corporations to prosecute and defend suits seeking relief similar to that sought herein in the corporate name. And this defendant denies that said Edwin M. Keatley is entitled to any relief whatsoever as in and by his said petition prayed." Rec. pp. 222, 223.

That on the 7th day of February, 1910, United States Circuit Court made and entered the following decree:

"Decree of February 7, 1910, Dismissing Intervening Petition of Edwin M. Keatley.—29336.

Carrie Rebecca Furey et al.

vs.

American Guaranty Company of Chicago.

"There having heretofore come on to be heard the intervening petition heretofore filed herein by Edwin M. Keatley, of Charleston, West Virginia, claiming to have been appointed receiver of said American Guaranty Company of Chicago, by the Circuit Court of Kanawha County, West Virginia, and the exhibits attached to said intervening petition; also the answers and exhibits thereto heretofore filed herein to said intervening petition by said American Guaranty Company of Chicago, by Edwin A. Potter, heretofore appointed herein receiver of said American Guaranty Company of Chicago, by A. E. Cross, Joseph F. Leaming, L. K. Torbet and A. E. Taylor, constituting the Contract-holders' Committee of said American Guaranty Company of Chicago, and by said Carrie Rebecca Furey and Caroline La Tour Furey, complainants herein; and there having heretofore also come on to be heard at the same time the motion of said intervening petitioner, orally made in open court, for an order herein to direct said Edwin A. Potter Receiver herein, to turn over the property, assets and effects of said American Guaranty Company of Chicago, in the possession, custody and control of said Edwin A. Potter, Receiver, to said intervening petitioner, Edwin M. Keatley; and the court having heretofore heard the respective arguments of Messrs. Thomas H. Gill, F. W. Houghton, George B. Edgerton and Chilton, McCorckle & Chilton, solicitors and of counsel for said intervening petitioner, and of Levy Mayer, Esq., solicitor and of counsel for said Edwin A. Potter, Receiver herein and the court having

heretofore taken all of said matters under advisement and now having duly considered the same, and being fully advised in the premises; Finds: That it has jurisdiction in the premises,

"That there is no equity in said intervening petition or in said motion, and that said intervening petitioner, Edwin M. Keatley, is not entitled to any of the relief prayed for in said intervening petition or in said motion.

"Wherefore, the premises considered, it is hereby ordered, adjudged and decreed that said intervening petition and the said motion, and each of them, shall be and the same are hereby overruled and denied and the said intervening petition is hereby ordered to be and the same is hereby dismissed." Rec. pp. 286, 287.

That the written opinion of the Honorable Christian C. Kohlsaat rendered prior to the signing of such decree, Rec. pp. 280-286, among other things contains the following:

Carrie Rebecca Furey, as Executrix,et al.

vs.

American Guaranty Company of Chicago.
Kohlsaat, J.:

"This cause is before the court upon the intervening petition of Edwin M. Keatley, as receiver appointed by the Circuit Court of Kanawha County, West Virginia, on September 22, 1909, setting up want of jurisdiction in this court, and asking that the further administration of the cause be relegated to said Kanawha County Circuit Court, and that the assets now held by the receiver of this court be turned over to said Keatley as such West Virginia receiver." Rec. pp. 280, 281.

He also says in such opinion:

"The contention is that the decree of the Kanawha County Circuit Court dissolving the corporation, so far ended its life as to deprive it of power to enter its appearance and consent to the appointment of a receiver in this Court, that this suit and the proceedings thereunder are void, while at the same time it is insisted that the original receiver became *de jure* receiver of and entitled to reduce to possession all of the assets of said corporation, including those now held by the receiver of this court, by virtue of said decree of February 1, 1909, notwithstanding its terms. * * * Rec. pp. 282.

The opinion then quotes sections 57, 58 and 59 of the Code of West Virginia and shortly after contains the following:

"Does the act of the company in entering its appearance to this suit come within the meaning of the provisions of Sec. 59 just enumerated, and had the corporation the power to enter its appearance herein and consent to the granting of the relief prayed? Was the proceeding here a necessary or proper and lawful act done in the corporate name for collecting the debts and claims due to the corporation, conserving its rights, enforcing its liabilities, and paying over and distributing its property to those entitled to it?" Rec. p. 283.

He again says: "Assuming that the proceeding in West Virginia was under the Sections of the statutes of that state above quoted, what was the effect of the order of the Kanawha County Court entered February 1, 1909?

1. Did it deprive the Guaranty Company of all authority to enter its appearance and consent to the granting of the prayer of the bill herein?

2. Did it invest the receiver with any further authority than that expressed therein?" Rec. p. 284.

And, again, "It is the assumption of the counsel for the intervening petitioner that when the first West Virginia Receiver was appointed the corporation died and could not be heard to assert its existence by doing any act in a foreign jurisdiction. The Law, however, is as stated by Thompson on Corporations, Sec. 7370, viz: 'After a corporation becomes dissolved, it can neither sue nor be sued, unless the faculty of suing or being sued is prolonged by statute for the purpose of winding up its affairs.'

"The order of the court dissolving the corporation was based upon the statute in that case provided, as otherwise the court might not take jurisdiction to that end; but applying the rule above cited from Thompson on Corporations, does the case come within the doctrine asserted by petitioners, viz., that a dissolved corporation is a corpse? Does not the statute prolong the faculty of suing or being sued for the purpose of winding up its affairs, and is not the present suit a proceeding for that purpose?" Rec. p. 284.

On Rec. p. 286 the Honorable Judge Kohlsaat continuing said:

"So I am constrained, under the circumstances, to hold that at the date of the institution of this suit, the West Virginia receiver was not vested with control and title to the property in the possession of the receiver herein, but that the same was, at most, held by the corporation in trust for creditors and stockholders; that this court, being a court of equity, has jurisdiction in the premises. The claim that the jurisdiction of this was in any manner affected by the September order of the West Virginia Court does not appeal to me as well founded. * * * I am of the opinion that the prayer of the intervening petitioner should be and it is denied."

On March 5, 1910, the special intervenor Keatley made and presented his petition for appeal to the Honorable Christian C. Kohlsaat together with his assignment of errors, which are as follows:

PETITION FOR APPEAL.

(Title)

"The above named Intervenor, Edwin M. Keatley, conceiving himself aggrieved by the order and decree entered on the 7th day of February, A. D. 1910, in the above entitled proceeding, dismissing his intervening petition herein, based solely upon the ground that this Honorable Court has never obtained jurisdiction of the person of the defendant, American Guaranty Company of Chicago, because of the lack of service of process on said defendant, and because no proper or legal voluntary appearance by said defendant was or could be made herein, doth hereby appeal from said order and decree to the Supreme Court of the United States and he prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree were made, together with the written opinion of the Honorable Christian C. Kohlsaat, on such question of jurisdiction rendered but not filed herein, duly authenticated, may be sent to the Supreme Court of the United States." Rec. p. 288.

Milwaukee, Wis., March 5, 1910.

(Title).

ASSIGNMENT OF ERRORS.

"And now at the same term, comes Edwin M. Keatley, as receiver, etc., Appellant and makes and files the following as his assignment of errors, to-wit:

1st. The Circuit Court of the United States for the Northern District of Illinois, Eastern Division, erred in taking jurisdiction of and over the person and property of the defendant American Guaranty Company of Chicago, after the decree of dissolution of, and appointment of a receiver for said defendant, entered pursuant to express statute, by a court of competent jurisdiction in the state of defendant's domicile, such jurisdiction of the said Circuit Court of the United States, resting solely upon a pretended appearance by attorneys for said defendant, appointed as such before said dissolution, and a similar pretended voluntary appearance by the former President and Secretary of said defendant corporation.

2nd. That said Circuit Court of the United States erred in making and entering its order and decree herein, dated February 7th, 1910, denying and dismissing the petition and motion of Edwin M. Keatley as receiver of said defendant corporation appointed by the said State Court, for right to intervene and have and receive as such officer, the property and assets of said defendant corporation now in possession of said Circuit Court of the United States." Rec. p. 289.

On May 6, 1910, the said Honorable Christian C. Kohlsaat directed the clerk to file such petition for appeal and such assignment of errors and drew up himself or had prepared for him, an order allowing appeal, which is as follows:

"Carrie Rebecca Furey et al.
vs.
American Guaranty Company of Chicago.

"Now comes Edwin M. Keatley, by his solicitors, and presents his petition for appeal and assignment of errors, praying an appeal to the United States Supreme Court from the order

and decree entered herein on February 7, 1910. This court is of the opinion that no question of jurisdiction is involved in said order and decree, but allows said appeal without certifying to any jurisdictional question, upon the said Keatley filing an appeal bond in the sum of Five Hundred Dollars ($500) with surety to be approved by the court." Rec. p. 290.

And thereafter and on May 23, 1910, the said petitioner presented his bond which was approved by the Court and filed on the same date.

PECULIAR FACTS.

A fair inference from such bill filed in West Virginia is, that said American Guaranty Company was solvent, in a prosperous condition and for several years had been growing rapidly in business, up to the time of the death of said Furey.

That, inasmuch as two months had elapsed from the death of said Furey before the filing of said bill in Kanawha County Circuit Court, the Board of Directors of such American Guaranty Company of Chicago must have known that the corporation was insolvent at such date, February 1, 1909.

The prayer of the bill in the Kanawha County Circuit Court was:

> "That this Court decree a dissolution of said American Guaranty Company of Chicago * * * and appoint one or more persons to be receivers to take charge of and administer the assets of said company."

The consent answer of the company was:

> "And consents to the granting of the prayer contained in said bill of complaint and to the entry of a decree of dissolution of said American Guaranty Company and to the appointment of a receiver to take charge of and administer its assets."

The other stockholders joined as complainants in such bill, "and requested that the prayer thereof be granted."

That only 962 shares of its capital stock out of the authorized 5,000 shares of such Guaranty Company had ever been issued.

That the Vice-president, Chairman of the Board of Directors and Vice-president owned 602 shares of the 962 shares.

That the 360 shares owned by Pitcher and Bigelow had been for several years held by the corporation as security for loans made to such parties by the corporation.

That at the time of the appointment of V. L. Black, receiver of the property and assets within the jurisdiction of such court, there were in such court and parties to such suit, all the stockholders thereof, and the corporation itself by its proper officers and attorneys.

That $1,300,000 of the property of such corporation was then and there in quick assets, securities, bank deposits and mortgages.

That the domicile of said corporation was Charleston, West Virginia.

That the legal situs of said personal property was at the domicile of said corporation. That all of said personal assets of said corporation was then and there within the jurisdiction of said West Virginia Circuit Court.

That only two of the surviving Board of Directors were stockholders of such corporation.

There is no allegation in the bill filed in the United States Circuit Court Northern District of Illinois, that Gorham & Wales had been previously appointed attorneys for said corporation to appear in such suit.

There was no reference in such bill by allegation or otherwise of section 59 of the Code of West Virginia or any of the provisions of such Code.

That the debt alleged to be due to Charles Furey, deceased, grew out of a contract made between himself as the actual President of the corporation, the chairman of the Board of Directors and the holder of nearly two-thirds of the stock of the corporation and was for commissions upon contracts issued by the corporation which constituted the entire work and business of such corporation.

That the report of the Federal receiver, Potter, made on March 26, 1909, shows the corporation to be largely insolvent.

That no notice whatever was given to the contract holders of the suit brought in West Virginia or in the United States Circuit Court.

That we have here the stockholders of an insolvent corporation without notice to any creditors,

except one of such stockholders who claimed to be a creditor, procuring the dissolution of such corporation and the appointment of a statutory receiver to wind up the affairs of the corporation, and then the appointment in another jurisdiction of another receiver to wind up the affairs of such corporation.

The allegation in the bill in the United States Circuit Court that certain contract-holders threatened suit following so soon the decree of dissolution certainly appears to be only fiction.

It is somewhat irregular that Gorham & Wales, the attorneys alleged to have been specially appointed by a resolution of the executive committee on January 30, 1909, to represent the Guaranty Company in the suit in Federal Court, should, four days after their pretended appearance as solicitors for the American Guaranty Company of Chicago to give the Federal Court jurisdiction, appear as attorneys for the Contract Holders Committee, representing more than 6500 contract holders who were the creditors of this insolvent corporation.

Verily, the *coup d'etat* of the American Guaranty Company of Chicago was completely planned and executed with great dispatch.

CONTENTS OF THE TRANSCRIPT OF RECORD AND EXPLANATION THEREOF.

From page 1 to page 128 of the Transcript of the Record are proceedings in the United States Circuit Court of Northern Illinois, up to the time of the filing of the Intervening Petition of Edwin M. Keatley,

which in any way or manner are material to the issues on this appeal.

This includes the original bill filed in United States Circuit Court which had in the first instance attached to it a certified copy of the entire proceedings had in the Circuit Court of Kanawha County on February 1, 1909.

The Special Intervening Petition of Edwin M. Keatley, with the Exhibits, is found Rec. pp. 128-214 (to folio 397).

This includes the Petition proper. Rec. pp. 128-135, with the Exhibits attached thereto. Rec. pp. 135-214.

The Exhibits are certified copies of all the proceedings in the Circuit Court of Kanawha County, West Virginia, from the filing of the bill in chancery on February 1, 1909, until the appointment of Edwin M. Keatley as receiver.

The petition of Keatley also refers to the Bill filed in the United States Circuit Court and all proceedings had thereunder up to and including the report of the receiver Potter on March 26, 1909.

The Answer of the American Guaranty Company of Chicago to the intervening petition of Keatley is found, Rec. pp. 216-280.

This same answer was adopted by Edwin A. Potter receiver. Rec. p. 279.

This same answer was also adopted by the Contract-holders Committee. Rec. p. 280.

The Notice of Motion of Edwin M. Keatley for leave to file his Intervening Petition in the United

States Circuit Court and the Order granting such leave, are found, Rec. pp. 214, 215.

The written Opinion of Judge Kohlsaat, Rec. pp. 280-286.

The Decree Dismissing the Intervening Petition of Keatley. Rec. pp. 286, 287.

Petition for Appeal and Assignment of Errors, Rec. pp. 288, 289.

Order Allowing Appeal. Rec. p. 290.

BRIEF.

I.

THE MOTION TO DISMISS THE APPEAL SHOULD BE DENIED BECAUSE THE RECORD CLEARLY SHOWS THAT THE SOLE QUESTION DECIDED BY THE COURT BELOW WAS A SINGLE DEFINITE QUESTION OF JURISDICTION, AND IT ALSO CLEARLY APPEARS FROM THE PETITION FOR APPEAL AND THE ORDER GRANTING IT, THAT THIS APPEAL WAS TAKEN TO THE SUPREME COURT TO REVIEW THE QUESTION OF JURISDICTION ALONE AND HENCE IS SUFFICIENT WITHOUT A CERTIFICATE.

Davis v. C. C. C. & St. L. R. Co., 217 U. S. 157.

Re Jefferson, 215 U. S. 130.

Excelsior W. P. Co. v. Pac. Bridge Co., 185 U. S. 282.

Shields v. Coleman, 157 U. S. 168.

Re Lehigh Min. & Mfg. Co., 156 U. S. 322.

Huntington v. Laidley, 176 U. S. 668.

Interior Const. Co. v. Gibney, 160 U. S. 217.

Smith v. McKay, 161 U. S. 355.

II.

THE RECORD CLEARLY SHOWS THAT THE SOLE QUESTION DECIDED BY THE COURT BELOW WAS ONE OF JURISDICTION AND NO CERTIFICATE IS IN SUCH CASE REQUIRED.

Davis v. C. C. C. & St. L. R. Co., 217 U. S. 157.

Re Jefferson, 215 U. S. 130.

United States v. Larkin, 208 U. S. 333, 338.

Chicago v. Mills, 204 U. S. 321.

Petri v. F. E. Creelman Lumber Co., 199 U. S. 487.

Excelsior W. P. Co. v. Pac. Bridge Co., 185 U. S. 282.

Harkrader v. Wadley, 172 U. S. 148.

Re Lehigh Min. Mfg. Co., 156 U. S. 322.

Smith v. McKay, 161 U. S. 355.

Interior C. & I. Co. v. Gibney, 160 U. S. 217.

Shields v. Coleman, 157 U. S. 177.

III.

THE JURISDICTION OF THE CIRCUIT COURT AS A FEDERAL COURT WAS INVOLVED IN THIS CONTROVERSY BECAUSE NO LAWFUL VOLUNTARY GENERAL APPEARANCE BY THE DEFENDANT WAS OR COULD BE MADE THEREIN. AND, BECAUSE OF THE FAILURE TO LAWFULLY SERVE THE DEFENDANT WITH ANY PROCESS.

Davis v. C. C. C. & St. L. Ry. Co., 217 U. S. 157.

Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217.

Shepard v. Adams, 168 U. S. 618.

Kendall v. Amer. Automatic Loom Co., 198 U. S. 477.

Board of Trade v. Hammond, 198 U. S. 424.

IV.

THE ENTIRE CONTROVERSY IN THE COURT BELOW WAS WHETHER OR NOT THE DECREE OF DISSOLUTION OF THE AMERICAN GUARANTY COMPANY OF CHICAGO AND THE APPOINTMENT OF RECEIVER BLACK OF THE ASSETS OF SUCH CORPORATION WITHIN THE JURISDICTION OF SUCH COURT UNDER THE PROVISIONS OF SECTIONS 57, 58 AND 59 OF THE CODE OF WEST VIRGINIA SO ENDED THE LIFE AND POWER OF SUCH CORPORATION AND ITS OFFICERS THAT IT COULD NOT THEREAFTER BY SUCH OFFICERS OR ATTORNEYS ENTER A GENERAL APPEARANCE IN THE UNITED STATES FEDERAL COURT SO AS TO GIVE SUCH COURT JURISDICTION IN SUCH ACTION.

Sections 56, 57, 58, 59 Chapter 53, Code of West Virginia, 3rd Ed., pp. 510, 511.

Alderson on Receivers, pp. 4, 19, 20, 79, 80, 276, 277, 387, 523.

White v. White, 130 Cal. 597.

Clark & Marshall on Private Corp., vol. 2, Sec. 319, pp. 912, 913.

Conklin v. U. S. Shipbuilding Co., 140 Fed. 219.

American Nat'l Bank of Denver v. Nat'l Benefit & Casualty Co. et al. (Wiswall intervener), 70 Fed. 420.

Pendleton v. Russell, 144 U. S. 640, 644, 645.

ARGUMENT.

I.

THE MOTION TO DISMISS THE APPEAL SHOULD BE DENIED BECAUSE THE RECORD CLEARLY SHOWS THAT THE SOLE QUESTION DECIDED BY THE COURT BELOW WAS A SINGLE DEFINITE QUESTION OF JURISDICTION AND IT ALSO CLEARLY APPEARS FROM THE PETITION FOR APPEAL AND THE ORDER GRANTING IT, THAT THIS APPEAL WAS TAKEN TO THE SUPREME COURT TO REVIEW THE QUESTION OF JURISDICTION ALONE AND HENCE IS SUFFICIENT WITHOUT A CERTIFICATE.

The issue which lies at the foundation of the controversy upon this appeal to this Court is a matter of record and so beyond dispute.

It is admitted by both sides that the American Guaranty Company of Chicago, a West Virginia corporation, was duly dissolved by the decree of the Kanawha County Circuit Court of West Virginia, on February 1, 1909, and V. L. Black appointed "receiver of *all and singular the property and assets of the American Guaranty Company of every description, within the jurisdiction of such Court*, to have and to hold and to administer the same under the orders of such Court." Rec. p. 53.

That such decree further provided: "All the creditors of said American Guaranty Company are hereby enjoined from interfering or meddling with any of the property of said American Guaranty Company."

It is also admitted that such decree of dissolution and such appointment of such receiver was the direct result of a suit in chancery brought, in such Kanawha County Circuit Court, by the owners of more than one-third of the capital stock of such Guaranty Company, as complainants, against such American Guaranty Company of Chicago, defendant.

That the prayer in such bill in chancery was,

> "That this court decree a dissolution of said American Guaranty Company of Chicago, and make such orders and decrees and award such injunctions in the cause as justice and equity may require; and appoint one or more persons to be receivers to take charge of and administer the assets of said defendant company, and grant such other and appropriate relief as may be proper in the premises." Rec. p. 28.

That the other stockholders appeared and joined as complainants and filed their written request that the prayer of the complaint be granted. Rec. p. 29.

More, said stockholders stated in writing,

> "That they have heard read the bill and know its allegations and prayer; that the said allegations are true and that the prayer thereof ought to be granted, and they consent to the granting of the same; that the granting of said prayer is to the best interests of said American Guaranty Company of Chicago and to all of its stockholders and creditors,

> and they respectively request that the said court shall grant the decree of dissolution of said American Guaranty Company of Chicago and appoint a receiver to take charge of and administer its assets, and make such other orders and decrees and award such injunctions in the cause as equity and justice may require." Rec. p. 30.

That such American Guaranty Company of Chicago duly appointed and filed its consent answer and made practically the same prayer as the complainants in such bill. Rec. p. 29.

It is also beyond dispute that the proceedings in the Circuit Court of Kanawha County were had under and were authorized by sections 57, 58 and 59 of Chapter 53 of the Code of West Virginia.

There is no dispute as to what the proceedings were in the United States Circuit Court in Chicago.

Such Court grounded its jurisdiction upon the claim of complainants that they were and had been for many years citizens and residents of Chicago, Illinois, and the defendant, the American Guaranty Company of Chicago, was a West Virginia corporation, was and had been for many years a citizen and resident of Charleston, West Virginia, and not of any other state or territory, and that the amount in controversy was in excess of two thousand dollars.

For such United States Circuit Court to obtain jurisdiction of the person of said defendant one of two things was necessary.

1. To duly serve a process upon such defendant, or

2. That such defendant should duly appear in such Court. (Pennoyer v. Neff, 95 U. S. 714, 733.)

There was no service of process.

The former President and Secretary of such dissolved corporation appeared in such United States Circuit Court and Gorham & Wales, as solicitors of such American Guaranty Company, appeared in such Court and filed a consent answer to such bill of complaint. Rec. p. 56.

By such pretended appearance and in no other way, the said United States Circuit Court obtained jurisdiction, if jurisdiction it has, over the person of said American Guaranty Company of Chicago.

The same complainants who brought the suit in West Virginia brought the suit in such United States Circuit Court.

More, in such suit in the United States Circuit Court the complainants brought with them into court and made part of their bill certified copies of all the records and proceedings in the Kanawha County Circuit Court.

Such complainants brought such suit in the United States Circuit Court both as creditors and as stockholders. Such complainants in such bill in the United States Circuit Court prayed for an accounting and the appointment of a chancery receiver. Rec. pp. 7, 8.

As a result of such suit in United States Circuit Court and on the same day an order was made by such United States Circuit Court appointing Edwin A. Potter receiver. Rec. p. 57.

Now it is very evident that whether or not the United States Circuit Court obtained jurisdiction over the person of the American Guaranty Company of Chicago depends entirely upon whether or not the statutes of West Virginia under which such decree of dissolution was granted and such receiver appointed, continued the life of such corporation for such purpose; or, whether by such decree of dissolution and the appointment of such receiver the power of such corporation to so act had been and was forever ended:

> For "when a corporation becomes dissolved in the state or country of its creation, in any mode known to the law of such state or country, it is dissolved everywhere else so that any action pending against it in a judicial tribunal in another state or country will abate upon the fact of its dissolution in the state or country of its domicile being brought to the attention of the court." This is elementary law.
>
> "In the absence of statutory provision to the contrary, a corporation, after it has been legally dissolved, can neither sue or be sued, and all actions or proceedings commenced against it prior to its dissolution are abated."
>
> Mumma v. The Potomac Co., 33 U. S. (8 Pet.) 281.
>
> Selma First Nat'l Bank v. Colby, 21 Wal-Wallace 609.
>
> Pendleton v. Russell, 144 U. S. 645.

After reciting all the proceedings in the Kanawha County Circuit Court up to and including his own appointment, and, also, all the proceedings in the United States Circuit Court of Northern District of

Illinois up to and including the appointment of Edwin A. Potter as receiver, and the filing of his report on March 26, 1909, Edwin M. Keatley as such receiver, in his special intervening petition, alleged; all that is found on record pp. 133, 134, beginning paragraph "Third" on page 133. This has been quoted in full on page ...

All the preceding allegations and averments in such petition are duly established by the exemplified copies of the records of Kanawha County Circuit Court attached to such petition and by the record of said United States Circuit Court. So that the only allegations or averments which are denied are found in such petition after such paragraph "Third," on page 133 of the Record.

It is there alleged in such petition:

> "That petitioner is advised by counsel and therefore alleges, that the judgment and decree of said Circuit Court for Kanawha County, West Virginia, dissolving and declaring at an end the incorporation of said American Guaranty Company of Chicago as a corporation under the laws of said state, so as aforesaid made and entered on said 1st day of February, A. D. 1909, was fully authorized by the provisions of sections 57 and 58 of Chap. 53 of the Code of West Virginia, and forever ended and determined the corporate existence of said defendant company and deprived it absolutely and entirely of any power or authority to act in any manner whatsoever as a corporation thereafter, and forever ended the authority of its officers to act for or in its behalf, except as expressly provided by section 59 of Chapter 53 of the Code of said State of West Virginia, whereby under the circumstances therein set out, officers of such corporation are

permitted to act for a limited time so far only as may be necessary in winding up the affairs of the corporation, and that, as in the said case in said Kanawha Circuit Court, where a receiver of the said dissolved corporation is appointed for the purpose of winding up the corporate business and affairs, the officers of said corporation are absolutely deprived of all authority to act, except as directed by the said court, or requested by the said receiver. And said section 59 further provides that the property and assets of the corporation shall, under the order and direction of the receiver appointed by such Circuit Court for the purpose, as is mentioned in the 57th section of said Chapter 53 of the Code of West Virginia, be subjected to the payment of the liabilities of the corporation and the expenses of winding up its affairs, and the surplus, if any, then remaining, to distribution among the stockholders according to their respective interests."

"That, therefore, the said dissolution of said American Guaranty Company of Chicago, by said decree of said Circuit Court of Kanawha County, West Virginia, so made and entered on the 1st day of February, 1909, and the appointment of said Black as such receiver, in and of itself, without the restraining order, also then and there issued, took from said corporation and its Board of Directors, and all its officers, every power, franchise, right and authority to appear for said corporation in this Honorable Court and submit to the jurisdiction thereof in this pending action, or to give to this Honorable Court jurisdiction herein, either over the person of said defendant company or the subject matter of winding up its affairs by and through its own receiver appointed in this cause upon the said 2nd day of February, A. D. 1909."

"That the said defendant corporation upon dissolution as hereinbefore mentioned, under the

laws of West Virginia, the state of the creation of said defendant, could only finish its business, conserve and marshal its assets, pay and discharge its lawful indebtedness and distribute and dispose of its surplus funds, if any, by and through the direction, orders, judgments and decrees of said Circuit Court of Kanawha County, West Virginia, and that any attempt so to do, or any interference with the property, business or assets of said defendant corporation, by any other court wherever situate, except ancillary to and upon the request and authority of said court of original jurisdiction, would be wholly unwarranted and without competent jurisdiction, and all the acts, orders, directions, judgments and decrees of such other court, and all its proceedings, would in that respect be *coram non judice* and without right."

"And your petitioner further shows, that he is advised by counsel and therefore alleges, that the pretended voluntary appearance in this Honorable Court and in this cause by said defendant American Guaranty Company of Chicago on said second day of February, A. D. 1909, by and through its attorneys Gorham & Wales, and its voluntary answer to said bill, and its consent to the appointment of receiver herein, when said corporation had been by the same parties, or in the same interests procured to be declared dissolved, and a receiver therefor so appointed in said state of West Virginia on said 1st day of February, A. D. 1909, gave to this Honorable Court no jurisdiction whatever, but was in fact a fraud upon this Honorable Court, and all proceedings subsequently taken herein are without right, and in truth and in law and fact, null and void."

The answer of the American Guaranty Company of Chicago by its former officers, and the answer of Edwin A. Potter as receiver and the answer of the

Contract-holders Committee (the last two adopt the said answer of American Guaranty Company) each deny these allegations above quoted of Keatley special intervenor. Rec. pp. 222, 223.

It is thus apparent that the issue, formed by such petition and such answers, is the question of the jurisdiction of said United States Circuit Court.

That is, did the decree of dissolution and the appointment of the receiver by the Circuit Court of Kanawha County, West Virginia, so far end the life and power of its officers, that, notwithstanding the provisions of section 59 of Chapter 53 of the Code of West Virginia, such American Guaranty Company of Chicago could not legally appear by its officers or attorneys Gorham & Wales, and file a consent answer in the United States Circuit Court so as to give such court jurisdiction over the person of said American Guaranty Company of Chicago.

In other words, do the provisions of said section 59 authorize such an appearance after such decree of dissolution and such appointment of such receiver?

Special Intervenor Keatley alleged and contended in his petition that such provisions of said section 59 do not authorize such an appearance.

The Federal receiver Potter, the Contract-Holders Committee and the American Guaranty Company in its answer made by its former officers, each contend and allege that such provisions of section 59 do authorize such an appearance.

There is thus formed, as very plainly appears by the petition on the one hand, and the three answers, on the other, only a single issue and that issue is the

jurisdiction of the United States Circuit Court over the person of the American Guaranty Company.

The closing paragraph of Edwin M. Keatley's intervening petition is as follows:

> "That by virtue of the order so made by said Circuit Court of Kanawha County, West Virginia, appointing your petitioner receiver of said Court for the property and assets of said defendant American Guaranty Company of Chicago, it becomes the duty of your petitioner to ask permission of this Honorable Court to intervene specially in this action, not acknowledging, but on the contrary, protesting the jurisdiction of this Honorable Court in the premises, and to ask that this Honorable Court permit to be filed herein, this petition for the purpose aforesaid, etc." Rec. p. 134.

The order granting leave to file such intervening petition after the recital is as follows:

> "It is thereupon ordered that leave be and the same is hereby given said receiver to file his intervening petition instanter, and leave is given the respondents to file their respective answers instanter, and it is further ordered that the replication to said answers be filed within five days from this date."

It was also further provided in such order:

> "And thereupon said intervening petitioner is given one week in which to file his brief upon the question of jurisdiction; the respondents to file their briefs within one week thereafter, and the said intervenor has three days thereafter to reply." Rec. p. 215.

The order grants the prayer of the intervenor, viz., the permission:

> "to intervene specially in this action not acknowledging, but, on the contrary, protesting the jurisdiction of this Honorable Court, in the premises, and to ask that this Honorable Court permit to be filed herein this petition for the purpose aforesaid."

It is thus seen that the petition is allowed to be filed, for *the sole purpose of protesting the jurisdiction of the said United States Circuit Court.*

The briefs were filed within the time, and the Court on January 26, 1909, rendered its decision, and the judge thereof thereafter filed a written opinion. Rec. pp. 280-286.

After reading the intervening petition of Keatley, the answers thereto of American Guaranty Company of Chicago, the Federal receiver Potter, and, Contract-Holders Committee and so discovering, that the *single issue* was one of jurisdiction; then reading such order granting leave to file such intervening petition which specially mentions the time given to the parties to file briefs on the question of jurisdiction, and one would hardly think anything more is necessary to determine that the question before such lower court was one of jurisdiction only.

But, in addition we have also the written opinion of Judge Kohlsaat which is *in itself conclusive* that the question of jurisdiction was the question urged by intervenor Keatley.

His Honor Judge Kohlsaat in his opinion at the very outset says:

> "This cause is before the Court upon the intervening petition of Edwin M. Keatley, as

receiver appointed by the Circuit Court of Kanawha County, West Virginia, on September 22, 1909, setting up want of jurisdiction in this court, etc." Rec. pp. 280-281.

Again he says:

"The contention is that the decree of the Kanawha County Circuit Court dissolving the corporation, so far ended its life as to deprive it of power to enter its appearance and consent to the appointment of a receiver in this court, that this suit and the proceedings thereunder are void, while at the same time it is insisted that the original receiver became *de jure* receiver of and entitled to reduce to possession all of the assets of said corporation, including those now held by the receiver of this court, by virtue of said decree of February 1, 1909, notwithstanding its terms." Rec. p. 282.

He then quotes three sections of Chapter 53 of the Code of West Virginia, viz., sections 57, 58 and 59.

And continuing says:

"Does the act of the company in entering its appearance to this suit come within the meaning of the provisions of Sec. 59 just enumerated, and had the corporation the power to enter its appearance herein and consent to the granting of the relief prayed? Was the proceeding here a necessary or proper and lawful act done in the corporate name for collecting the debts and claims due to the corporation, conserving its rights enforcing its liabilities, and paying over and distributing its property to those entitled to it?" Rec. p. 283.

Again he says:

"Assuming that the proceeding in West Virginia was under the sections of the statutes of

that state above quoted, what was the effect of the order of the Kanawha County court entered February 1, 1909?

"Did it deprive the Guaranty Company of all authority to enter its appearance and consent to the granting of the prayer of the bill herein?" Rec. p. 284.

And again:

"It is the assumption of the counsel for the intervening petitioner that when the first West Virginia Receiver was appointed, the corporation died, and could not be heard to assert its existence by doing any act in a foreign jurisdiction. The law, however, is as stated by Thompson on Corporations, Sec. 7370, viz.: 'After a corporation becomes dissolved, it can neither sue nor be sued, unless the faculty of suing or being sued is prolonged by statute for the purpose of winding up its affairs.

"The order of the court dissolving the corporation was based upon the statute in that case provided, as otherwise the court might not take jurisdiction to that end; but applying the rule above cited from Thompson on Corporations, does the case come within the doctrine asserted by petitioners, viz., that a dissolved corporation is a corpse? Does not the statute prolong the faculty of suing or being sued for the purpose of winding up its affairs, and is not the present suit a proceeding for that purpose? State v. Laurel Fork Oil & Coal Co., 45 W. Va., 838, and Swing v. Bentley & Gerwig F. Co., 45 W. Va. 283, do not seem conclusive to the contrary." Rec. p. 284.

And concludes as follows:

"I am of the opinion that the prayer of the intervening petitioner should be and it is denied." Rec. p. 286.

The decree of the United States Circuit Court made and entered February 7, 1910, dismissing intervening petition of Edwin M. Keatley, after the recitals is as follows:

> "And the court having heretofore taken all of said matters under advisement and now having duly considered the same, and being fully advised in the premises, finds: That it has jurisdiction in the premises.
>
> "That there is no equity in said intervening petition or in said motion, and that said intervening petitioner, Edwin M. Keatley, is not entitled to any of the relief prayed for in said intervening petition or in said motion.
>
> "Wherefore the premises considered, it is hereby ordered, adjudged and decreed, that said intervening petition and the said motion and each of them shall be and the same are hereby overruled and denied; and the said intervening petition is hereby ordered to be and the same is hereby dismissed." Rec. 287.

Taking such decree with the decision, bearing in mind that there was one single issue formed by the petition of special intervenor Keatley, and the answers thereto, viz., the question of jurisdiction, and, can there be any question in the minds of this Honorable Court that the record in the court below shows that the sole question before that court was the question of the jurisdiction of the said United States Circuit Court as a Federal Court?

Counsel says that there were two questions, the question in the petition, and, the question in the motion.

It appears from the recital in the order a motion

was made at the same time during the proceedings in the court below "to turn over the assets."

How the motion happened to be made or when made, or whether any notice of such motion was given does not appear.

But, assuming the motion was made, what of it? The motion could have no purpose or effect in any way or manner, if the court below had jurisdiction of the American Guaranty Company at the time such federal receiver was appointed.

If the court, however, did not have jurisdiction of the American Guaranty Company at the time of the appointment of the receiver Potter, then the assets of the said American Guaranty Company were wrongfully in the possession of such Court, and it would have been the duty of the court on its own motion (having decided that it had made an order appointing a receiver when it had no jurisdiction) to direct such receiver to yield the possession of the assets of the American Guaranty Company to the receiver appointed by the West Virginia Court.

Further, suppose that, after reciting all the facts and denying the jurisdiction of the Court as was done, in such petition, said Keatley, as such receiver, had asked permission to intervene specially in order to request the court below to order its receiver to turn over the assets in its hands on the ground that such court when it made the order appointing such receiver and directed such assets to be turned over to him and for such receiver to take possession of such assets, had

no jurisdiction of the person of the American Guaranty Company.

Precisely the same question would arise, viz., the question of the Court's jurisdiction.

So that it is immaterial so far as this appeal is concerned whether we consider the motion as made in addition to the petition filed or not, it *raises the same question*, the question of jurisdiction of such court, and no other question.

In other words the right of the possession of the assets in Keatley was a corollary arising from the contention in his petition, viz., if the federal court had made an order appointing a receiver of a corporation over which the federal court had no jurisdiction, and the said court, discovering, *finally*, that it had made such an order, would necessarily yield and direct its receiver to turn the possession of the assets, so wrongfully taken, over to the possession of the party rightfully entitled to have such possession.

So, in any view, it is immaterial to this appeal whether we regard the motion as made or not.

Continuing the discussion, on March 6, 1910, petitioner Keatley presented to the Circuit Judge of said United States Circuit Court Honorable Christian C. Kohlsaat, his petition for appeal and his assignment of errors. Rec. pp. 288, 289.

After the title the petition for appeal is as follows:

> "The above named Intervenor, Edwin M. Keatley, conceiving himself aggrieved by the order and decree entered on the 7th day of February, A. D. 1910, in the above entitled proceeding,

dismissing his intervening petition herein, based solely upon the ground that this Honorable Court has never obtained jurisdiction of the person of the defendant, American Guaranty Company of Chicago, because of the lack of service of process on said defendant, and because no proper or legal voluntary appearance by said defendant was or could be made herein, doth hereby appeal from said order and decree to the Supreme Court of the United States, and he prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree were made, together with the written opinion of the Honorable Christian C. Kohlsaat, on such question of jurisdiction rendered but not filed herein, duly authenticated, may be sent to the Supreme Court of the United States." Rec. p. 288.

Counsel for appellant were informed and believed at the time such petition was made that his Honor, Judge Kohlsaat, had not filed and would not file his written opinion in such case, but, it appears from the record that it was filed January 26, 1910, at least it was so endorsed.

The Assignment of Errors presented at the same time after the title is as follows:

"And now at the same term, comes Edwin M. Keatley, as receiver, etc., Appellant, and makes and files the following as his assignment of errors, to-wit:

"1st. The Circuit Court of the United States, for the Northern District of Illinois, Eastern Division, erred in taking jurisdiction of and over the person and property of the defendant American Guaranty Company of Chicago, after the decree of dissolution of, and appoint-

ment of a receiver for said defendant, entered pursuant to express statute, by a court of competent jurisdiction in the state of defendant's domicile, such jurisdiction of the said Circuit Court of the United States, resting solely upon a pretended appearance by attorneys for said defendant, appointed as such before said dissolution, and a similar pretended, voluntary appearance by the former President and Secretary of said defendant corporation.

"2. That said Circuit Court of the United States erred in making and entering its order and decree herein, dated February 7th, 1910, denying and dismissing the petition and motion of Edwin M. Keatley as receiver of said defendant corporation appointed by the said State Court, for right to intervene and have and receive as such officer the property and assets of said defendant corporation now in possession of said Circuit Court of the United States." Rec. p. 289.

On the 6th day of May, 1910, his Honor, Judge Kohlsaat, filed such Petition for Appeal and such Assignment of Errors and then and there drew his Order allowing appeal, which is as follows:

"Now comes Edwin M. Keatley, by his solicitors, and presents his petition for appeal and assignment of errors, praying an appeal to the United States Supreme Court from the order and decree entered herein on February 7, 1910.

"This court is of the opinion that no question of jurisdiction is involved in said order and decree, but allows said appeal without certifying to any jurisdictional question, upon the said Keatley filing an appeal bond in the sum of Five Hundred Dollars ($500) with surety to be approved by the court." Rec. p. 290.

Considering then:

1. There is only one issue formed by the special intervening petition of Keatley and the three answers thereto already shown.

2. The prayer in the petition of Keatley to be allowed to intervene, to protest the jurisdiction of the court, and for that purpose to file such petition.

3. The order granting leave to file such intervening petition gives to counsel for Keatley, special intervenor, a week's time to file a brief on the question of jurisdiction, and gives to the other counsel a week to make answer to such brief, and then gives to counsel for Keatley three days to reply on such question of jurisdiction.

4. The opinion of Judge Kohlsaat clearly shows *what* the contention of Keatley was, and *that* the *sole question was one* of *jurisdiction.*

5. The decree dismissing the petition finds that the court *has jurisdiction* and *dismisses the petition.*

6. The *petition* for *appeal* and the *assignment* of *errors* each shows the question of jurisdiction was the sole question.

In view of the record, the order, the decisions and the decree, together with the petition for appeal and the assignment of errors; and, the *Order* allowing the appeal, though it recites "that this court is of the opinion that no question of jurisdiction is involved in said order and decree, but allows said appeal without certifying to any jurisdictional question," just as clearly indicates to this court, as though a certificate had been prepared, that the question on appeal to this court is the question of jurisdiction.

Davis v. C. C. C. & St. L. Ry. Co., *supra*, was a case where the Circuit Court dismissed the action on defendant's objection that the attachment of its property was illegal, and that the Court had therefore not acquired jurisdiction of the person or the property of the defendant; on a motion to dismiss based on the ground, among others, "that the certificate as to jurisdiction was not granted during the term at which the judgment was rendered; that the certificate is not sufficient in law nor proper in form, in that it does not state any facts or propositions of law upon which the court's lack of jurisdiction rested; that the jurisdiction of the court as a federal court was not put in issue," this court speaking through Mr. Justice McKenna on page 171 said:

> "The grounds of the motion based on the form or sufficiency of the certificate are not tenable. Even if we should admit, which we do not, that the certificate is not, as it is contended, in proper form, the record shows clearly that the only matter tried and decided in the circuit court was one of jurisdiction. This is sufficient. United States v. Larkin, 208 U. S. 333, 339."

In re Jefferson *supra*, where a District Court dismissing a libel for salvage services on the ground that there can be no lien for services in extinguishing a fire on a vessel while in a dry dock, and therefore, because the District Court as a court of admiralty, had no jurisdiction of the case, the Supreme Court on an appeal taken directly to it held, that as the question of jurisdiction of the District Court as a federal court was the only question decided by it, the direct appeal to the Supreme Court was proper.

On pages 136 and 137 Mr. Justice White, now Chief Justice White, speaking for the court said:

> "As upon the face of the record, irrespective of the recitals in the order made on the allowance of the appeal, it is apparent that the only question which was decided below was one of jurisdiction, and as the decree which was appealed from on its face shows that the cause was dismissed for want of jurisdiction, the question of jurisdiction, if it is of such a character as to sustain the appeal, was sufficiently certified. United States v. Larkin, 208 U. S. 333, 338. We therefore put the contentions as to the absence of a certificate out of view."

In Excelsior W. P. Co. v. Pac. Bridge Co. *supra*, motion was made by defendants to dismiss the appeal upon the ground that no appeal was taken and no certificate of the trial court upon the question of jurisdiction was made by such court during the term at which the decree was rendered and that no such certificate has since or ever been made. Mr. Justice Brown speaking for the court on page 285 said:

> "This decree, after reciting that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction. An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed: 'from the final order and decree dismissing said suit for want of jurisdiction.' This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of

> that court. Shields v. Coleman, 157 U. S. 168; In re Lehigh Mining Co., 156 U. S. 322; Huntington v. Laidley, 176 U. S. 668."

In Interior Const. Co. v. Gibney *supra*, the real question raised in the court below on the plea in abatement by defendant was whether or not a general appearance had been made by the defendant in such court.

The court below sustained the plea in abatement holding there was no general appearance and adjudged that the plaintiff take nothing by its action, and that the defendant recover costs.

Thereupon a writ of error was issued to this Court on the question of jurisdiction and this Court held that whether or not there was a general appearance in the lower court was such a question of jurisdiction as was appealable directly to the Supreme Court. And Mr. Justice Gray speaking for the court on page 219 said:

> "The record shows that the only matter tried and decided in the Circuit Court was a demurrer to the plea to the jurisdiction; and the petition, upon which the writ of error was allowed, asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this court, as required by the act of March 3, 1891."

II.

THE RECORD CLEARLY SHOWS THAT THE SOLE QUESTION DECIDED BY THE COURT BELOW WAS ONE OF JURISDICTION

AND NO CERTIFICATE IS IN SUCH CASE REQUIRED.

While Davis v. C. C. C. & St. L. R. Co. *supra*, has been cited to proposition I, it is equally applicable to the II. proposition.

In that case Mr. Justice McKenna speaking for the Supreme Court on page 171 said:

> "Even if we should admit, which we do not, that the certificate is not, as it is contended, in proper form, the record shows clearly that the only matter tried and decided in the circuit court was one of jurisdiction. This is sufficient. United States v. Larkin, 208 U. S. 333, 339."

All other allegations of the said intervening petition of special intervenor Keatley except those alleging want of jurisdiction are either admitted in each of the answers of the Guaranty Company, Edwin A. Potter as receiver, etc., the Contract-holders Committee, or, are verified by the certified records of the Circuit Court of Kanawha County annexed to such petition.

It does appear in such petition, that an apt deed by said Commissioner Clark of all of said property and assets of said American Guaranty Company of Chicago to said Edwin M. Keatley was duly made under the order and direction of said Kanawha County Circuit Court and duly approved by said court on October 13, 1909, and that therefore the right to the possession of said assets is in said Keatley. Rec. pp. 132, 133.

A mere conclusion of law, from the deed and order approving the same duly certified and annexed to such petition. Rec. pp. 136, 137.

If such United States Circuit Court acquired no jurisdiction of the American Guaranty Company of Chicago by such appearance so made by the former officers and attorneys of said American Guaranty Company, then by such deed the absolute title to such assets vested at once in said Keatley. But, it is contended further and will be so presently argued: That both V. L. Black and Edwin M. Keatley were statutory receivers, whose powers were unalterably fixed by the provisions of said sections 58 and 59 of Chapter 53 of the Code of West Virginia.

That any attempt by the Circuit Court to add to or in any way limit such authority would be and was void.

For,

> "A receiver of a corporation appointed by a court under statutory authority is generally invested by the statute with full title to the property and choses in action of the corporation, in whatever jurisdiction the same may be situated, and is the proper party to suits in relation thereto."
>
> Clark & Marshall on Private Corporations, Vol. 2, p. 961;
>
> Kokomo City Street R. Co. v. Pittsburg, Cincinnati, Chicago & St. L. R. Co. (Ind. App.) 58 N. E. 211.
>
> "Where the court exercises purely statutory jurisdiction, its proceedings must be within the provisions of the statute. Any action of the court beyond the provisions (of the statute) would be without jurisdiction."
>
> Alderson on Receivers, pp. 19, 20, citing—White v. White, 130 Cal. 597.

All the rights and power and authority of Receiver Black passed to Receiver Keatley.

> "Statutes continuing the right of action in the corporation for a certain period of time after its dissolution, such as exist in many of the states, are not properly construed as having the effect of continuing such rights of action in the corporation after a receiver has been appointed to wind up its affairs."
>
> Thompson Commentaries on the Law of Corporations, Vol. 5, Sec. 6900.

And in Sec. 6910 the same author says:

> "From what has preceded, it necessarily follows that where a special statutory provision is made for the winding up of a corporation and distribution of its effects, no action can be maintained by a creditor or policy holder for a similar object, either before or after proceedings have been instituted under the statute, and a receiver appointed."
>
> "Such receiver, trustee, or assignee being clothed with the full powers of such corporation and the right to exercise them in so far as is necessary to wind up its affairs is the sole legal representative thereof with full authority to reduce to possession the corporate property wherever found. This principle is admitted as settled law in the case of Grogan v. Egbert, 44 W. Va. 75. Language of Dent Judge in Strong v. Bentley & Gerwig F. Co., 45 W. Va. 283, 285."
>
> "The effect of appointing a receiver over a corporation is to take the property out of the control of its officers to whom it has been entrusted by its stockholders."
>
> Clark v. Nat'l Linseed Oil Co., 105 Fed 787, 792.

No attempt was made to make Receiver Clark a party to the action in Federal Court.

The receiver appointed by the West Virginia Court not being made a party to the action in the United States Circuit Court at its inception, such court did not and could not acquire jurisdiction over the assets or the person of the American Guaranty Company in Chicago.

> Relfe v. Rundle, 103 U. S. 222.
> Pendleton v. Russell, 144 U. S. 640.
> Bernheimer v. Converse, 206 U. S. 516.
> Converse v. Mears, 162 Fed. 767.
> Nelson v. Hubbard (Ala. July 27, 1892), 17 L. R. A. 375.
> Marion Phos. Co. v. Rachael Perry, 74 Fed. 425.
> Merchants L. & T. Co. v. Claire, 107 N. Y. 663.
> Fry v. Charter Oak Ins. Co., 31 Fed. 197.
> Parsons et al. v. Charter Oak Ins. Co., 31 Fed. 305.
> Bank of Denver v. Nat'l Benefit & Casualty Co. et al. (Wiswall intervenor), 70 Fed. 420.

Of course, much force will be given by this Supreme Court to the construction of its own statutes by the Supreme Court of West Virginia.

From the several authorities cited it seems beyond controversy that under the sections 58 and 59 of West Virginia the life and authority of the corporation so dissolved, and over which such receiver was appointed was not continued so as to give the officers of such corporation and attorneys theretofore appointed for such purpose the right to enter a general

appearance in the Federal Court in Chicago and thus give jurisdiction to such court.

To raise this question and to protest such jurisdiction, as said before, receiver Keatley asked the court's permission for leave to specially intervene and for such purpose to file his intervening petition. Such leave was granted.

In Chicago v. Mills, supra, it was held that the failure of the certificate of a Federal Court to show the exact nature of the jurisdictional question relied on to sustain a direct appeal to the Supreme Court, does not defeat the jurisdiction of the latter court, where an examination of the record, aided by the opinion of the Circuit Court, contained therein and made part thereof, distinctly shows the nature of the question of jurisdiction passed upon. And on that proposition Mr. Justice Day, speaking for the court in that case on page 326 said:

> "A Preliminary objection is made that the certificate does not show whether the jurisdictional question arose from insufficient amount, want of diversity of citizenship, collusion, or otherwise. But we are of the opinion that an examination of the record, aided by the opinion of the court contained therein, and made part thereof, distinctly shows that the question of jurisdiction passed upon concerned the collusive character of the action of the complainant.
>
> "We think this brings the case within the ruling in Smith v. McKay, 161 U. S. 355. * * * in which the court, looking into the character of the appeal, the certificate of the court, and the certified copy of the opinion, made part of the record, sustained the court's jurisdic-

tion, citing, with approval, Shields v. Coleman, 157 U. S. 168, * * * and re Lehigh Min. & Mfg. Co. *supra*."

As we have sought to show, and as clearly appears from reading the certified opinion of his Honor Judge Kohlsaat, made a part of the record in this case, there is no escape from the conclusion that the one question raised and presented to the court below by the intervening petition of Keatley was the question of the jurisdiction of the Federal court as such. That is, the jurisdiction which the court obtained, if any, by the appearance made in behalf of the dissolved corporation by its former officers and by such attorneys or solicitors Gorham & Wales.

The case of Petri v. F. E. Creelman Lumber Co. *supra*, is directly in point. Mr. Justice White, now Chief Justice White, delivered the opinion of the Supreme Court in that case, and on page 492, speaking for the Court, said:

> "A motion to dismiss the writ of error first requires our attention. It is urged that the writ should be dismissed because the bill of exceptions filed below and the certificate made as to the question of jurisdiction on this writ of error were authenticated by a judge other than the trial judge, and further, because the certificate was not made at the term in which the judgment complained of was entered. We are relieved, however, from the necessity of considering these objections, for the reason that the judgment of dismissal and the prior proceedings clearly exhibit the ground upon which the judgment was based, and plainly make apparent on the record the fact that the only matter tried and decided in the circuit court were demurrers to pleas to the jurisdiction, and that the petition upon which

> the writ of error was allowed asked only for the review of the judgment, which decided that the court had no jurisdiction of the action. This being the state of the record, no bill of exceptions or formal certificate in respect to the matter decided was required, and the question of jurisdiction alone was sufficiently certified to this court as required by the act of March 3, 1891."

The other cases cited are to the same effect. It therefore seems conclusively established that the record clearly shows that the sole question decided by the Court below was one of jurisdiction; and, that no certificate in such cases is required; and, hence that the motion to dismiss the appeal should be denied.

III.

THE JURISDICTION OF THE CIRCUIT COURT AS A FEDERAL COURT WAS INVOLVED IN THIS CONTROVERSY BECAUSE NO LAWFUL VOLUNTARY GENERAL APPEARANCE BY THE DEFENDANT WAS OR COULD BE MADE THEREIN AND, BECAUSE OF THE FAILURE TO LAWFULLY SERVE THE DEFENDANT WITH ANY PROCESS.

The case of Davis v. C. C. C. & St. L. Co., *supra*, cited to both the preceding propositions is also in point here.

On pages 171 and 172 of that case Mr. Justice McKenna speaking for the court said:

> "As we have shown, the circuit court decided that it had no jurisdiction over either the person or the property of the principal defend-

ant, the C. C. C. & St. L. R. Co. The first, non-jurisdiction over the person, depending, as the court considered, upon the second, non-jurisdiction over the property, as we understand the opinion. And this view of it the circuit court of appeals took."

(Almost identical with the proposition involved in the controversy here, appellant Keatley in assuming a right to the possession of the property and basing that right on the nonjurisdiction of the United States Circuit Court over the person of Guaranty Company.)

"The latter court stated the questions to be: 'Was defendant's appearance to contest the validity of the attachments and garnishments a general one? Were the cars and credits of defendant subject to attachment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for want of jurisdiction. In respect of the essential character of these questions, they are not distinguishable from one of the legality of the service of summons upon a defendant. They do not pertain to the merits of the case, and did not arise during the progress of a trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power is termed 'jurisdiction.' It is none the less a jurisdictional matter in the case of attachment and garnishment of property of a nonresident because the power of the court to proceed to trial depends, in the absence of the defendant, upon its lawful seizure of his property. The question of jurisdiction was decided in favor of defend-

ant, and the decision disposed of the case.' For these propositions the court cited Board of Trade v. Hammond Elevator Co., 198 U. S. 428. * * * United States v. Jahn, 155 U. S. 109, * * * St. Louis Cotton Compress Co. v. American Cotton Co., 60 C. C. A. 80; 125 Fed. 196; and, as we have seen, dismissed the case on the ground that this court alone had the power to review the decision of the circuit court. We concur in the views of the circuit court of appeals, for which also may be cited Kendall v. American Automatic Loom Co., 198 U. S. 477."

So we say here, at the very threshold the United States Circuit Court was confronted with the proposition, was the appearance by the former officers of the dissolved American Guaranty Company or the attorneys appointed for such purpose prior to its dissolution, authorized and legal, and did such appearance confer upon the United States Circuit Court jurisdiction over the person of the American Guaranty Company of Chicago?

The case of Interior Const. Co. v. Gibney, *supra*, has already been cited to the I. proposition.

Such case is directly in point on this III. proposition. For, as already stated, the question at the threshold of the action in the United States Circuit Court was the legal right of the former officers of the American Guaranty Company and of Gorham & Wales, attorneys appointed for such purpose, prior to the dissolution of such corporation, to appear in such action in such Circuit Court and file a consent answer, and by so doing could or did give such court jurisdiction of the American Guaranty Company.

In the Interior Construction Co. case I quote from the statement of facts made by Mr. Justice Gray, on page 218 where that distinguished jurist said:

> "The complaint alleged that the plaintiff was incorporated under the laws of the State of New Jersey, and was a citizen thereof; and that all the defendants were citizens and residents of the State of Indiana.
>
> "On June 19, 1890, the defendants Gibney, McElwaine and Wheeler, by their attorney, entered a general appearance. But Gibney never pleaded or answered; and the defendant Bartley never appeared, or made any defense.
>
> "On September 19, 1891, McElwaine and Wheeler pleaded in abatement that at the time of the bringing of this action, and ever since, Gibney and Bartley were citizens of the State of Pennsylvania, and not citizens or residents of the State of Indiana; and that, therefore, the court had no jurisdiction of the case.
>
> "The plaintiff demurred to this plea, as not containing facts sufficient to constitute a cause for the abatement of the action. The plaintiff declining to plead further, but electing to stand upon its demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs.
>
> "The plaintiff thereupon presented a petition for the allowance of a writ of error 'for the review of the judgment hertofore rendered therein in favor of the defendants and against the plaintiff, therein holding and deciding that this court has no jurisdiction of said action;' and assigned, as errors, that the Circuit Court erred, 1st, in overruling the plaintiff's demurrer to the plea in abatement; 2d, in sustaining the plea in abatement, and holding that the court had no jurisdiction of the cause; 3d, in entering judg-

ment in favor of the defendants and against the plaintiff on the plea in abatement, and dismissing and quashing the proceedings. The writ of error was thereupon allowed by the judge presiding in the Circuit Court."

Mr. Justice Gray delivered the opinion of the court, after stating the facts as quoted, and, therein speaking for the court on page 219 stated:

> "The record shows that the only matter tried and decided in the Circuit Court was a demurrer to the plea to the jurisdiction; and the petition, upon which the writ of error was allowed, asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this court. * * *"

After quoting from the act of March 3, 1887, Mr. Justice Gray continued:

> "The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different States. Diveristy of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privileges, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

It is thus seen that the real basis and ground of the appeal in that action was the appearance of the defendants in court, and whether or not that appearance gave the court jurisdiction.

In the case of Shephard v. Adams, *supra*, the question of the jurisdiction of the court arose on the proposition as to whether or not a sufficient process was properly served upon the defendant, under the law of the state of Colorado.

Mr. Justice Shiras delivered the opinion of the Court and on page 622, speaking for the court said:

> "This case is brought here under section 5 of the act of March 3, 1891, as one involving a question of the jurisdiction of the District Court of the United States for the District of Colorado; and the first contention we have to meet is that of the defendant in error, that the case is not really within the meaning of that section of said act, but presents only the case of an alleged error in the judgment of the District Court, redress for which should have been sought in the Circuit Court of Appeals. It is said that the question of whether or not the District Court acquired jurisdiction by a proper service of process is not one which involves the jurisdiction of the court, within the meaning of that term as used in the act; and the case of Smith v. McKay, 161 U. S. 355, is cited as sustaining such view.
>
> "In the case referred to, the respective parties were duly in court and the subject-matter of the controversy was within the jurisdiction of the court; but it was claimed by the defendant that the plaintiff, instead of asserting his right by a bill in equity, should have proceeded by an action at law, which afforded an adequate remedy. The court below was of opinion that the plaintiff was not wrong in seeking his remedy

in equity. Thereupon the defendant brought the case here directly, contending that the case involved the question of the jurisdiction of the Circuit Court, within the meaning of section 5 of the act of March 3, 1891. But it was held here that the court, in deciding that the plaintiff's remedy was in equity and not at law, was in the lawful exercise of its jurisdiction, and that, if the court was wrong in so deciding, it was an error for which the defendant should have sought his remedy in the Circuit Court of Appeals.

"The present case differs from Smith v. McKay in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court."

So on this appeal, the question, and the sole question is, the entire *want* of *jurisdiction* of the United States Circuit Court by either a service of process or by an authorized and legal appearance of the dissolved corporation of the assets of which a statutory receiver had been appointed.

In Kendall v. American Automatic Loom Co., *supra*, the question arose of whether the validity of the service of a subpoena issued by a federal court upon the resident treasurer of a foreign corporation involves the jurisdiction of that court as a Federal Court so as to sustain a direct appeal to the Supreme Court of the United States under the act of March 3, 1891, from an order setting aside the service, and, it was *there held*, it did. The late Mr. Justice Peckham delivered the opinion of the court in that case and on page 182, speaking for the court said:

> "It is objected, in the first place, by the appellee, that the appellant had no statutory right to appeal directly to this court from the order setting aside the service of the subpoena. It is asserted that the case does not involve the jurisdiction of the court below within the meaning of section 5 of the act of March 3, 1891, * * * inasmuch as the jurisdiction of the circuit court as a Federal Court is not questioned, the jurisdiction being denied upon grounds alike applicable to any other judicial tribunal, state or Federal, under the same circumstances. This case is, however, on that point governed by that of Board of Trade v. Hammond Elevator Co. 198 U. S. 424, * * * where it is held that the order is reviewable by this court under the section above mentioned."

The very contention of counsel for Potter receiver in this case, that the statutes of West Virginia and their provisions are general in their application and that the question which arises under them would be equally applicable to any state or other court.

So is the question of the service of process.

And this Supreme Court says, when such statute raises, at the very threshold of the action, the question of jurisdiction, then it is a question of federal jurisdiction and is appealable, and the question may be brought by direct appeal to this Court.

The case of Chicago Board of Trade v. Hammond Elevator Co. though quoted from by counsel for receiver Potter is, nevertheless directly in point and sustains the contention of appellant on this proposition.

In that case the question was whether or not the validity of the service of process of the Federal Cir-

cuit Court on certain persons as the agents of a foreign corporation involves the jurisdiction of that court so as to sustain a direct appeal to the Supreme Court of the United States under the act of March 3, 1891, from a decree dismissing the bill for lack of valid service. I have quoted from the syllabus in that case. And this Supreme Court there *held* it had jurisdiction to review the action of such Circuit Court in dismissing the appeal.

It would seem then from these authorities, that from the decree dismissing the intervening petition of Keatley as receiver an appeal lies directly to the Supreme Court of the United States.

For, if the former officers and attorneys of the dissolved corporation had no authority or legal right to appear and file a consent answer in such United States Circuit Court then such court never acquired jurisdiction of the person of such American Guaranty Company of Chicago.

As before stated there are only two ways by which the United States Circuit Court could acquire jurisdiction of the person of the American Guaranty Company of Chicago, viz., either by the proper service of a process upon such defendant, or, that such defendant should properly appear in court.

So whether there was a legal voluntary appearance is equally as important as whether there was a legal service of process.

The Supreme Court has passed upon both propositions and has held that in either case an appeal from the Circuit Court lies directly to the Supreme Court. See Interior Const. Co. v. Gibney, *supra*; Davis v. C. C. C. & St. L. R. Co., *supra*.

IV.

THE ENTIRE CONTROVERSY IN THE COURT BELOW WAS WHETHER OR NOT THE DECREE OF DISSOLUTION OF THE AMERICAN GUARANTY COMPANY OF CHICAGO AND THE APPOINTMENT OF BLACK RECEIVER OF THE ASSETS OF SUCH CORPORATION WITHIN THE JURISDICTION OF SUCH COURT UNDER THE PROVISIONS OF SECTIONS 57, 58 AND 59 OF THE CODE OF WEST VIRGINIA SO ENDED THE LIFE AND POWER OF SUCH CORPORATION AND ITS OFFICERS, THAT IT COULD NOT THEREAFTER, BY SUCH OFFICERS OR ATTORNEYS, ENTER A GENERAL APPEARANCE IN THE UNITED STATES FEDERAL COURT SO AS TO GIVE SUCH COURT JURISDICTION IN SUCH ACTION.

If in discussing these several propositions of law some reference is made to the merits of the appeal, it is done either in answer to the argument of the attorney for receiver Potter, or to show that because the United States Circuit Court could not acquire jurisdiction by the appearance therein of said former officers and attorneys of the American Guaranty Company of Chicago, and, hence did not acquire such jurisdiction, therefore, the only question which could have been raised before such court by the appellant Keatley on the record was that of such jurisdiction.

The question which was at the very threshold of this action in the United States Circuit Court was and is, has that court jurisdiction of the person of the American Guaranty Company as appears from the record?

The bill in United States Circuit Court contains this allegation:

> "11. That on February 1, 1909, in accordance with the statutes of the State of West Virginia authorizing the same, a bill in chancery was filed in the Circuit Court of Kanawha County, West Virginia, in which the principal office or place of business of said Guaranty Company is situated, praying that the court decree a dissolution of said Guaranty Company and to make such other orders and decrees as justice and equity may require, and in said bill, so filed, said Pitcher and Bigelow duly intervened and joined as plaintiffs, and joined in the allegations and prayer of said bill; that said Guaranty Company duly entered its appearance to said bill; that on said February 1, 1909, said Circuit Court of Kanawha County, having full jurisdiction of all of the parties to and subject-matter of said bill, duly entered a decree dissolving said American Guaranty Company of Chicago, which decree is now in full force and effect, unmodified, unreversed and unappealed from; and also appointed a receiver, who has duly qualified as such, of all of said Guaranty Company's assets and effects located within said State of West Virginia; that a true copy of said proceedings in said Circuit Court of Kanawha County is herewith brought into court."

As already shown, and, notwithstanding the statement in such paragraph just quoted, V. L. Black was appointed receiver "of all and singular the property and assets of such Guaranty Company within the jurisdiction" of the Circuit Court of Kanawha County, West Virginia.

By all the stockholders and by the Guaranty Company itself, all being parties to the suit, the prayer of the bill of complaint is:

"Appoint one or more persons to be receivers to take charge of and administer the assets of said defendant company."

The corporation itself was a party to its own death.

In State ex. rel. Atty. Gen. v. Fidelity L. & T. Co. 113 Ia. 439, where the court had decreed the dissolution of the corporation and the appointment of a receiver, the corporation appealed from the portion of the decree appointing the receiver, and the Iowa Supreme Court held:

"The defendant by acquiescing in the decree conceded the determination of itself as a legal entity. The appeal from a part of the decree in no way effected the portion appealed from.

"The order of dissolution is as complete and final as it will be in a thousand years.

"The Court was empowered by section 1640 of the Code to make it (the decree) and all have acquiesced in it as made.

"From the time of that entry the corporation has been dead and its agencies ended, its employes, including attorneys, discharged, and it put, without exception or notice of approval, beyond all further corporate activity."

Receiver Black was a statutory receiver.

"Statutory receivers are those who are appointed in pursuance of special statutory provisions, whence they derive their powers, and to which they must look for guidance in performing their duties."

Alderson on Receiver p. 4.

"Where the court exercises purely statutory jurisdiction, its proceedings must be within the

provisions of the statute. Any action of the court beyond the provisions would be without jurisdiction."

Alderson on Receivers pp. 19, 20.

"In a proceeding seeking the appointment of a receiver founded on statute, which provides for receivers in cases not within the inherent power of courts of equity, the statute will be strictly construed, and the allegations and proofs must clearly bring the proceeding within the legislative enactment, and the power by it expressly conferred, or necessary to the effective exercise of such power. The statutory provisions must be strictly followed, they being in derogation of the common law."

Alderson on Receivers, p. 79.

"In very many, if not all, of the states there are statutes providing for the appointment of receivers for particular purposes, as for winding up corporations, in supplementary proceedings and the like, and their rights, duties and powers are, by such statutes, marked out with more or less precision. In such cases the officers whose authority is so created and specified have been said to more nearly resemble statutory assignees than receivers of the court of chancery; but in another jurisdiction it has been asserted that the powers and functions of statutory receivers are far more extensive than those of an assignee in a voluntary assignment; that he represents the interest of both debtor and creditors, and is a trustee for all parties."

Alderson on Receivers, p. 276.

"Unlike common law receivers, whose powers are given by the order of appointment, statutory receivers, being those authorized by statute in cases where a court of equity has not inherent power to appoint receivers, derive their powers from the statutes in pursuance of which they are

appointed. Not only must the statute be strictly followed in appointing the receiver, but also in the exercise by the receiver of his powers."

Alderson on Receiver p. 277.

"Where the statute expressly defines the powers of the receivers which it authorizes to be appointed they are confined to the exercise of those powers and such others only as are implied."

Alderson on Receiver pp. 523, 524.

"It is well settled, as a general principle, that unless jurisdiction is conferred by statute, courts of equity have no jurisdiction to decree a dissolution of a corporation, or declare a forfeiture of its charter for misuser or nonuser, but the only remedy is at law. And this is true whether the suit be brought by a stockholder or other private individual, or by the attorney or solicitor general in the name and on behalf of the state."

Clark & Marshall on Private Corp. Vol. 2 Sec. 319, pp. 912, 913.

"Unless the jurisdiction be conferred by statute a court of equity is without jurisdiction to decree the dissolution of a corporation."

Conklin v. United States Shipbuilding Co., 140 Fed. 219.

The proceedings in the Circuit Court of Kanawha County, West Virginia, on February 1, 1909, were all statutory proceedings.

That being so, receiver Black was a statutory receiver.

Sections 58 and 59 of Chapter 53 of the Code of West Virginia define the powers of such receiver.

Section 58 provides:

> "When a corporation * * * is dissolved upon sufficient cause being shown therefor, such court as is mentioned in the preceding section may, on application of a * * * stockholder, appoint one or more persons to be receivers to take charge of and administer its assets."

Section 59 provides:

> "When a corporation shall * * * be dissolved, its property and assets shall, under the order and direction * * * of the receiver or receivers appointed for the purpose by such Circuit Court as is mentioned in the 57th section of this Chapter be subject to the payment of the liabilities of the corporation and the expenses of winding up its affairs; and the surplus, if any, then remaining, to distribution among the stockholders according to their respective interests."

When no receiver has been appointed then the provisions of said section 59 provide as follows:

> "When a corporation shall * * * be dissolved, its property and assets shall, under the order and direction of the Board of Directors then in office, * * * be subject to the payment of the liabilities of the corporation etc."

Certainly, when a receiver is appointed the Board of Directors can not take charge of and administer the assets.

There is nothing in the record which shows any action or attempted action on the part of the Board of Directors, either by way of authorizing the appearance of the corporation or the attorneys in such court, nothing of the kind is alleged. While it appears certain from the record that all the stockholders and the corporation itself, being parties in the chancery suit brought in the Circuit Court of Kanawha County,

West Virginia, on February 1, 1909, to dissolve the corporation and *appoint one or more persons receivers to take charge of and administer its assets*, (such county being the domicile of such corporation), all of the personal assets of the corporation were certainly within the jurisdiction of such court, and V. L. Black was by such decree made *receiver of all of such personal assets to the amount of $1,300,000*. Yet, independent of that, V. L. Black being a statutory receiver was vested with all the rights of a statutory assignee, and was entitled to the possession of all of the property of such dissolved corporation wherever situate.

Relfe v. Rundle, 103 U. S. 222.
Pendleton v. Russell, 144 U. S. 640.
Alderson on Receivers, p. 276.

Certainly, it was a question whether or not, after such decree of dissolution of the American Guaranty Company of Chicago, and the appointment of such receiver, the former officers of such corporation or attorneys appointed prior to such dissolution had any authority to appear for such dissolved corporation in the Circuit Court of the United States and thus confer jurisdiction on such court.

If such officers and such attorneys were not invested with such power, then the United States Circuit Court acquired no jurisdiction. What such court may have done thereafter, and what its receiver may have done thereafter, and what the creditors may have done thereafter, no matter how many of them may have appeared and filed their accounts in such court, in no manner gives jurisdiction, the question of the

court's jurisdiction relates back to the very threshold of the action and depends entirely upon the legality of such voluntary appearance by such former officers and such attorneys of such dissolved corporation.

This is not a question of expediency or of deferred rights, or whether or not, as attorney for receiver Potter contends:

> "The inventory filed by the receiver in the Federal Court on March 26, 1909, shows assets in his possession amounting, in cash and securities to over $1,400,000. Seven thousand two hundred nineteen claimants have filed proofs of claims with the Master in Chancery to whom the matter was referred by the Federal Court."

All that has no bearing upon the question of the jurisdiction of the United States Circuit Court. Such Court obtained jurisdiction, or, has no jurisdiction, by such pretended appearance.

It would be just as proper for counsel for appellant Keatley to urge in answer to such statement of attorney for receiver Potter that such statement of counsel is untrue, that from the report of receiver Potter, Rec. (p. 170) it appears that in any event the net liabilities of the American Guaranty Company of Chicago are $1,085,755.95; and, to meet said liabilities there is only a net balance of assets of $792,864.99.

And that such liabilities may in the opinion of such receiver amount to $2,075,398.32.

It would not be a competent argument to the question before this Supreme Court for counsel for appellant to urge, that notwithstanding such condition the said Contract-holders are represented through

the said Contract-holders Committee by the very attorneys Gorham & Wales, who sought to give the Federal Court jurisdiction by appearing as the attorneys for the dissolved corporation in the first instant.

That is, attorneys for an insolvent corporation on the 2nd of February and attorneys for the creditors of that insolvent corporation on the 6th of February.

All of that has no application to the motion before this Supreme Court.

Counsel contends that there were two questions at least before the Court below, one was on the motion made by receiver Keatley, that the said United States Court direct its receiver to turn over to receiver Keatley the assets then in the possession of said Court belonging to said American Guaranty Company, and, the *question of jurisdiction* raised by such intervening petition of Edwin M. Keatley as such receiver.

The action in the United States Circuit Court was not an action *in rem*.

On the contrary such action was against the person of the American Guaranty Company of Chicago.

Then the jurisdiction of such court in no way depended upon the possession of the assets of said American Guaranty Company being in such court or being within the jurisdiction of such court, but on the contrary, the jurisdiction of such court depended upon whether or not there was a service of process upon such defendant or whether such defendant made a legal and authorized voluntary appearance in such court, such as to give such court jurisdiction.

The question of service of process is out of the case, as no pretence is made of any service of process.

Therefore, whether or not the United States Circuit Court and its receivers were in the lawful possession of the assets of such corporation depends entirely upon whether such court had jurisdiction of the person of the American Guaranty Company of Chicago.

Whether or not such United States Court had jurisdiction of the person of said American Guaranty Company depends in turn upon the authority or lack of authority of such dissolved American Guaranty Company of Chicago to voluntarily appear in such court by its former officers and by attorneys theretofore appointed for such purpose, after its dissolution and the appointment of a receiver.

So it is contended that when appellant Keatley made the motion in the court below that such United States Circuit Court direct its receiver to turn over the possession of the assets of the American Guaranty Company of Chicago then in his possession to such receiver Keatley, that by such motion the question of the jurisdiction of such court over the person of such American Guaranty Company was raised. And this is so because the right of possession of such Federal Court to the assets of such dissolved corporation depended entirely upon the jurisdiction of that court over the person of the American Guaranty Company of Chicago.

Therefore, to question the right of possession was to question the jurisdiction of the court.

In view of the premises it seems clear that the motion of receiver Potter to dismiss this appeal should be denied.

Finally, it is said in

ANSWER TO ARGUMENTS OF COUNSEL FOR RECEIVER POTTER.

I.

Counsel for Receiver Potter correctly states the law to be that in an appeal directly to the Supreme Court of the United States from the Circuit Court to raise the question of the jurisdiction of the Circuit Court, there must be a certificate of the Circuit Judge to the effect that the only question sent up is one of jurisdiction, or that the equivalent of such certificate must be shown by the record.

Counsel fails, however, in his attempt to show that the present case is without the operation of such rule. The record here clearly shows that the question raised by the appeal is solely that of the jurisdiction of the Circuit Court as a Federal Court. In such case a certificate is not necessary.

The prayer of the intervening petition, the order allowing the filing of such petition, the decision of the Circuit judge, the order denying the prayer of the petition, the petition for appeal, the order allowing the appeal, the assignment of errors, show clearly and definitely that only a single question is presented, and that single question is the initial jurisdiction of the Circuit Court.

His attempt to show that there is an appeal from a judgment involving several issues fails, as it is seen that the only issue raised by the intervening petition and the answers thereto is the sole issue of the initial jurisdiction of the lower court.

His argument to the point that the asking for an order by the Circuit Court directing Receiver Potter to turn over the assets of the American Guaranty Company to Receiver Keatley raises a question of equity as between two receivers, *fails* when it is observed that the basis of the asking of such an order is not that there is any greater equity in favor of the possession of Receiver Keatley, than there is in the possession of Receiver Potter, but that if the Circuit Court did not acquire *jurisdiction of the person of the American Guaranty Company, then it never acquired any jurisdiction of its property*, and it so held it without right. This question lies deeper than the matter of equity between two receivers. It questions the jurisdiction of the Circuit Court over either the property or person of the American Guaranty Company, because of want of appearance or service of process on it.

The asking for such an order raises only the question of the right of the Circuit Court to take possession of such assets by virtue of the fact that it had not properly before it the owner of such assets. If the owner of the assets was not properly before it, certainly the assets were not, as there was no proceeding here analogous to a proceeding *in rem* to acquire jurisdiction over the assets.

As to the proposition that the assignment of errors raised a question other than that of jurisdiction, because it assigned as error the refusal of the Court to turn over the assets to Receiver Keatley, the answer is that the basis for such assignment was the lack of the initial jurisdiction of the Court to take over such assets when the owner of the assets was not before the Court, and the assets were not in Court by any proceeding against them.

II.

In his second point Counsel states the law to be that no appeal directly to the Supreme Court of the United States from the Circuit Court can be maintained on the ground of jurisdiction where the jurisdiction of the Federal Court as a Federal Court is not raised.

Assuming this statement of the law to be a correct one, the present case does not come within that rule.

The present case is one where the question *is* that of the initial jurisdiction of the Circuit Court as a Federal Court. It raises the question as to the proper voluntary appearance of the American Guaranty Company without which the Court could not take jurisdiction of the American Guaranty Company or its property.

It therefore comes within the rule of the cases heretofore cited and discussed which hold that an appeal lies directly to the Supreme Court from the Circuit Court, where the question raised by an appeal is that of the initial jurisdiction of the Court.

based upon either the lack of the service of process, or lack of proper voluntary appearances. These cases hold that the jurisdiction of the Federal Court as a Federal Court is there the question raised.

The attorney for receiver Potter, on page 29 of his brief, refers to the recital in the order of the court allowing the appeal, viz., "This court is of the opinion that no question of jurisdiction is involved in said order and decree." The answer to that suggestion is very simple.

The United States Circuit Court, as appears from the opinion of Judge Kohlsaat, adopted the same view as the attorney for receiver Potter, viz., that such West Virginia statute is a general statute and so applicable to State Courts as well as to the United States Courts. Therefore, in the opinion of such court, whether or not the officers of such dissolved corporation, or the attorneys appointed prior to its dissolution, could legally enter a voluntary appearance and thus give such Circuit Court jurisdiction, did not raise the question of the jurisdiction of such court as a federal court.

However, it is contended on the part of appellant that such is the very question of jurisdiction which lies at the threshold of this controversy.

Respectfully submitted,

F. W. HOUGHTON,
Attorney for Appellant.

EDWIN M. KEATLEY,
as Receiver, etc.

15

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 84

EDWIN M. KEATLEY, AS RECEIVER OF AMERICAN GUARANTY COMPANY OF CHICAGO, UNDER APPOINTMENT OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA,

Appellant,

vs.

CARRIE REBECCA FUREY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF CHARLES LA TOUR FUREY, DECEASED, AND ALSO IN HER OWN RIGHT; EDWIN A. POTTER, AS RECEIVER OF THE AMERICAN GUARANTY COMPANY OF CHICAGO, BY APPOINTMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, ET AL.,

Appellees.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE EDWIN A. POTTER, AS RECEIVER OF THE AMERICAN GUARANTY COMPANY OF CHICAGO.

LEVY MAYER,
Attorney for Appellee Edwin A. Potter, as Receiver of the American Guaranty Company of Chicago.

CHICAGO, ILLINOIS.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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Appellees.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE EDWIN A. POTTER, AS RECEIVER OF THE AMERICAN GUARANTY COMPANY OF CHICAGO.

STATEMENT OF THE RECORD.

On April 3, 1911, appellee submitted his motion to dismiss this appeal, on the ground that this court has no jurisdiction. The court postponed determination of that motion until the hearing on the merits. A sufficient statement of the facts is contained in appellee's argument in support of that motion.

BRIEF.

I.

THE AMERICAN GUARANTY COMPANY OF CHICAGO COULD BE SUED IN THE FEDERAL COURT SITTING IN ILLINOIS, NOTWITHSTANDING THE COMPANY'S DISSOLUTION BY THE STATE COURT OF WEST VIRGINIA AND THE FEDERAL COURT OF CHICAGO HAD JURISDICTION IN THE CASE AT BAR (pp. 6-24).

Secs. 57, 58, 59 of Corporation Act of West Virginia (Code of West Virginia, ch. 53).

Miller's Admx. v. *Newburg Orell Coal Co.*, 31 W. Va., 836.

Stiles v. *Laurel Fork Oil & Coal Co.*, 47 W. Va., 838.

Hamilton v. *Glenn*, 85 Va., 901.

Richmond Union Passenger Ry. Co. v. *N. Y. Seabeach Co.*, 95 Va., 386.

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Ohio & M. Ry. Co. v. *Russell,* 115 Ill., 52, 57.

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II.

THE RECEIVER APPOINTED IN THE WEST VIRGINIA DISSOLUTION PROCEEDINGS WAS NOT A STATUTORY RECEIVER, BUT A MERE CHANCERY RECEIVER, AND HE WAS NOT INVESTED BY STATUTE WITH THE TITLE TO THE PROPERTY OF THE DISSOLVED CORPORATION, OR MADE ITS LEGAL SUCCESSOR (pp. 24-39).

Great Western M. & M. Co. v. *Harris,* 198 U. S., 561.

Bacon v. *Robertson,* 18 How., 480.

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III.

EVEN IF THE WEST VIRGINIA RECEIVER WERE A STATUTORY RECEIVER, NEVERTHELESS HE ACQUIRED NO TITLE TO THE PROPERTY BEYOND THE JURISDICTION OF THE COURT APPOINTING HIM, INASMUCH AS THE ORDER APPOINTING HIM LIMITED HIS AUTHORITY TO THAT JURISDICTION (pp. 39-41).

Secs. 57, 58, 59, West Virginia Corporation Act (Code of West Virginia, Ch. 53).

IV.

THE LEGAL SITUS OF THE PROPERTY HERE INVOLVED IS IN ILLINOIS AND NOT IN WEST VIRGINIA. AS THE WEST VIRGINIA COURT APPOINTED A RECEIVER OF ONLY THE PROPERTY WITHIN ITS JURISDICTION, IT FOLLOWS THAT SUCH RECEIVER COULD ACQUIRE NO TITLE TO ANY OF THE PROPERTY IN CONTROVERSY (pp. 41-47).

Wyman v. *Halstead,* 109 U. S., 654, 656.
Railway Co. v. *Sturm,* 174 U. S., 710.
Blackstone v. *Miller,* 188 U. S., 189.
State Board of Assessors v. *Comptoir National,* 191 U. S., 388.
New England Mutual Life Ins. Co. v. *Woodworth,* 111 U. S., 138.
Buck v. *Beach,* 206 U. S., 392.
Jellenik v. *Huron Copper Mining Co.,* 177 U. S., 1.
Sellinger v. *Kentucky,* 213 U. S., 200, 204.

V.

APPELLANT'S CHARGE OF BAD FAITH IS WITHOUT ANY JUSTIFICATION IN FACT, AND IS WHOLLY IMMATERIAL AS A MATTER OF LAW (pp. 47-53).

Blair v. *Chicago*, 201 U. S., 400.
So. Dakota v. *North Carolina*, 192 U. S., 286.
Re Metropolitan Railway Receivership, 208 U. S., 90.
Re Cleland, 218 U. S., 120.

ARGUMENT.

I.

THE AMERICAN GUARANTY COMPANY OF CHICAGO COULD BE SUED IN THE FEDERAL COURT SITTING IN ILLINOIS, NOTWITHSTANDING THE COMPANY'S DISSOLUTION BY THE STATE COURT OF WEST VIRGINIA, AND THE FEDERAL COURT AT CHICAGO HAD JURISDICTION IN THE CASE AT BAR.

The contention of appellant is, as stated on p. 103 of his brief, that after the dissolution of the Guaranty Company by the decree of the West Virginia state court, and the appointment of a receiver, "the former officers of such corporation had no power or authority to appear in the Federal Court in Chicago and give jurisdiction to that court in such suit brought by the complainants therein."

A careful reading of the West Virginia statute will, we believe, clearly show that appellant's contention rests entirely upon a forced and erroneous construction.

Section 57 of the statute in question provides that if not less than one-third in interest of the stockholders of a corporation desire to wind up its affairs they may apply by a bill in chancery to a Circuit Court, setting forth the grounds of their application,

> "and the court may thereupon proceed *according to the principles and usages of equity* to hear the matter, and if sufficient cause therefor be shown, to decree a dissolution of the

corporation, and *make such orders and decrees and award such injunctions in the cause as justice and equity may require.*"

Section 58 of the same statute provides that when a corporation expires, or is dissolved, or even before its expiration or dissolution, upon sufficient cause shown, the Circuit Court "*may,*" on application of either a creditor, or a stockholder,

> "appoint one or more persons to be receivers to take charge of and administer its assets; and *whether such receiver be appointed or not, may make such orders and decrees and award such injunctions in the cause as justice and equity may require.*"

Section 59 of the statute provides that when a corporation shall expire, or be dissolved, its property shall

> "under the order and direction of the board of directors then in office, or the receiver or receivers appointed for the purpose by such Circuit Court * * * be subject to the payment of the liabilities of the corporation and the expenses of winding up its affairs, and the surplus, if any, then remaining, to distribution among the stockholders according to their respective interests. *And suits may be brought, continued or defended, the property, real and personal, of the corporation be conveyed or transferred under the common seal or otherwise, and all lawful acts be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration;* but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

Thus, the legislature of West Virginia has, in unmistakable language provided that the dissolution of a corporation shall not absolutely terminate all its corporate powers, but that, notwithstanding such dissolution, suits may still be brought, continued or defended by the corporation, and its property may be conveyed, and all lawful acts may be performed by it, "*in like manner and with like effect as before such dissolution.*" The only limitation on the exercise of this power is that the corporate action shall be necessary, or proper for collecting its property, converting the same into money, prosecuting and protecting its rights, and distributing its property to those entitled thereto.

Under the express provisions of the statute the Guaranty Company can prosecute and defend, can sue and be sued after its dissolution indefinitely until all of the debts and claims owing to it have been collected, all its property and rights converted, and until all its liabilities have been enforced and its property and assets distributed. The suit in which this appellee was appointed receiver, was concededly of the character indicated in the statute, its object being to collect and equitably distribute the company's assets among all of its creditors and all other persons entitled thereto.

The order of February 1, 1909, entered by the West Virginia court does not purport to oust the company of any of the powers so reserved to it by section 59 of the statute, or to divest it of title to any of its property. That order was merely one in the usual form, appointing a receiver in chancery to

take possession of the company's property "*within the jurisdiction of this court*" (Rec., 53), and provided that before entering upon the discharge of his duties, the receiver should give a bond conditioned according to law.

There is not the slightest suggestion in the statute to support appellant's theory that the clause in section 59 continuing corporate functions, notwithstanding dissolution, may be exercised by the corporation only when no receiver is appointed, and by the receiver only, where one is appointed. No good reason has been assigned for so interpreting the statute, and there clearly is no need for such a forced construction, inasmuch as the corporate rights which are preserved may, whether a receiver be appointed or not, be exercised only for the purpose of conserving and collecting the corporate assets and distributing them among the parties entitled thereto, and protecting corporate rights. The language of the statute is clear, that a corporation may, notwithstanding its dissolution and the appointment of a receiver, continue to exercise the specified corporate functions, (subject only to the purposes named), "*in like manner and with like effect as before such dissolution;*" and it is difficult to conceive how a receiver could execute the reserved powers "in like manner" as the corporation itself could. The interpretation given this clause by appellant entirely eliminates the phrase, "in like manner." Counsel for appellant have cited no authority for their novel position. And if their contention be sound, then, we inquire, why did counsel have the order of September 22, 1909, appointing ap-

pellant receiver, direct that the Guaranty Company execute a conveyance of its property to appellant within 15 days, otherwise such conveyance to be made by a special commissioner? If the clause in section 59 continuing corporate functions only applies to the company when no receiver is appointed, and only applies to the receiver when one is appointed, then the West Virginia court was ordering the company to do the impossible when it directed it to make a conveyance.

The Supreme Court of West Virginia in *Miller's Admx.* v. *Newburg Orrell Coal Co.*, 31 W. Va., 836, (1888), said with respect to the very statute here involved:

> "Very soon after *Rider* v. *Factory*, 7 Leigh, 154, was decided and according to a suggestion of the court in that case the General Assembly of Virginia at the session of 1836-7 passed an act which has ever since been in force. This statute without material change was incorporated in our Code in 1868 and has continued to be and still is in force in this state. It provides in substance that when a corporation shall expire or be dissolved its property and assets shall * * * be distributed among its stockholders. * * * It provides, in general terms, that suits may be brought or defended in the corporate name with like effect as before the dissolution, so far as shall be necessary for collecting the debts and enforcing the liabilities of the corporation. This language is certainly sufficiently comprehensive to embrace any suit, whether at law or in equity, which is proper for collecting the debts due to, or enforcing the liabilities against, the corporation; and this seems also necessary to give effect to the general object and purpose of the statute. It was evidently intended to be for the mutual benefit of

the creditors of the corporation, as well as for the stockholders and *the corporation itself.*"

In *Stiles* v. *Laurel Fork Oil & Coal Co.,* 47 W. Va., 838, the court said:

> "By the common law, when a corporation expires, its lands revert to their grantors, its personalty goes to the crown, and debts to or from it are extinguished. (Citing authorities.) * * * And upon the expiration of the charter, at common law, all pending suits abated, and no suit could be instituted against it, because, unlike natural persons, it was dead, without heirs or officers for service of process. So it had neither property nor representatives. (Citing authorities.) Thus there could be no attachment against it. This unreasonable rule of the common law, leaving the corporations vested with no property to pay debts, and creditors no remedy, was obviated by the good sense of equity jurisprudence, which entertained a suit by a creditor to enforce their demands against the property of the company. (Citing authority.)
>
> But while the common law did not allow any suit after expiration of the charter, our statute (Sec. 59, c. 53, Code) adopts the principles of courts of equity before its adoption, namely, that *for some purposes the corporation still owned its property:* that is,—*First,* for the payment of the creditors; and *secondly,* for the purpose of giving the residue of its assets to the stockholders."

The same doctrine was laid down in a number of decisions in Virginia, from which state, as shown by *Miller's Admx.* v. *Newburg Orrell Coal Co.,* 31 W. Va., 798, *supra,* the statute under consideration was taken.

Hamilton v. *Glenn,* 85 Va., 901.

Richmond Union Passenger Ry. Co. v. *N. Y. Seabeach Ry. Co.,* 95 Va., 386.

And this court in *Bacon* v. *Robertson*, 18 How., 480, applied the equitable doctrine referred to in *Stiles* v. *Laurel Fork Oil & Coal Co., supra.*

In *White Mountain Paper Co.* v. *Morse*, 127 Fed., 643, (1 C. C. A., 1904), a New Jersey corporation was adjudged a bankrupt in New Hampshire, although a prior decree of dissolution had been entered by the court in New Jersey under the statutes of that state. The court said (p. 645):

> "Following the ordinary practice in nearly all, if not all, the states, the legislature of New Jersey provided that a decree of dissolution should be, to a certain extent, only *nisi*, so that a corporation does not immediately on such a decree cease to live, but retains for a specified period a qualified existence. Even if, under such legislation, from the time of the nominal dissolution, no judgment could be rendered against the corporation according to the statutes of the state of its domicile, *foreign tribunals, including federal courts and state courts in exercising their appropriate jurisdictions, permit the corporation meanwhile to sue and be sued in its own name, and judgments to be entered for and against it accordingly.*" (Citing a number of authorities.)

Even if the West Virginia court had appointed a receiver on February 1, 1909, of all the Guaranty Company's property, wherever located, the Company would still have been subject to a suit subsequently brought against it in the Federal Court sitting in Illinois. There is nothing in the West Virginia statute to prevent the institution of such a suit, but, on the contrary, its language expressly permits it. Furthermore, if the West Virginia statute had in fact prohibited such a suit, we do not

think that the Federal Court at Chicago, sitting in equity, would have been bound thereby. (*Bacon* v. *Robertson*, 18 How., 480.)

Appellant's counsel, (Br., bottom p. 101), after asserting that because of the decree of February 1, 1909 dissolving the corporation and appointing a receiver, the company could not appear to defend itself in litigation thereafter brought against it in West Virginia, make the unqualified statement, "that it could not so appear in West Virginia has been decided at least twice by the Supreme Court of West Virginia in the two cases cited, one from 44 W. Va., 75; and the other 45 W. Va., 284."

We have carefully examined both of those cases and cannot understand why counsel cited them, inasmuch as neither of them considers, or even refers to the question of the right, or power of a dissolved corporation, for which a receiver has been appointed, to appear thereafter and defend itself in court proceedings. Indeed, no such question was ever involved in either of those cases.

To say that the dissolution of the Guaranty Company on February 1 so annihilated the company as to prevent it from entering its appearance or filing an answer in the Federal Court at Chicago on February 2, is in the teeth of the West Virginia statute. If the contention of counsel be sound, it would follow that if, prior to its dissolution, the Guaranty Company had itself instituted a suit, or had been sued in the Federal Court at Chicago, then immediately upon its dissolution it could no longer prosecute or defend such foreign suit, and it would then be impossible to protect the company's rights

as contemplated and expressly provided for in section 59 of the statute. It is no answer to say that the West Virginia receiver could enter such foreign jurisdiction and prosecute or defend the supposed suit, inasmuch as that receiver is not, as we shall presently show, a statutory receiver and has no extra-territorial powers. And it is clear that V. L. Black, who was appointed receiver in the West Virginia proceedings on February 1, could not act outside of the jurisdiction of the West Virginia court, because his appointment was expressly limited by the order appointing him to the property located within the jurisdiction of the court, and the only power given him was to take possession of so much of the company's property as was located within that jurisdiction. (Rec., 53.*) The order did not even authorize the receiver to represent the company in any litigation whatsoever, much less in litigation outside of the State of West Virginia.

This record shows that the Guaranty Company's answer to the bill at bar was signed by its president and attested by its secretary, and corporate seal, and was also signed by its solicitors (Rec., 56), who, as the record shows, were expressly authorized by a resolution adopted by the Guaranty Company on January 30, 1909 (two days before the company's dissolution) to enter the company's appearance in any proceedings which might be instituted in any court, State or Federal, sitting in Chicago, Illinois, and in such proceedings to consent to the appointment of a receiver. (Rec., 218.) In

*All record references are to the printed pages of the transcript of record.

view of the statute we confidently submit that the company could lawfully be sued in the case at bar, and that its answer was properly filed and gave the court jurisdiction over its person.

Appellant also attacks the jurisdiction of the Federal Court, on the alleged ground that the Royal Trust Company was an indispensable party and that it was a citizen of the same state as complainants. This is a question not presented by any assignment of error (Rec., 289), and moreover, we deny that the Royal Trust Company was an indispensable party. It was not even a trustee of an active trust, but was merely a custodian or depository of certain funds.

Certain of the contracts issued by the Guaranty Company provided that a specified per cent. of the moneys should be deposited with the Royal Trust Company, but the mere fact referred to by counsel (Br., 46), that the contracts contained a provision that in case of the dissolution of the Guaranty Company the funds so deposited should be divided among the holders of certain contracts in a specified proportion, did not devolve any duty whatever on the part of the Royal Trust Company, nor change the character of the deposit so as to take it away from the assets of the Guaranty Company. The agreement between the Guaranty Company and the Royal Trust Company, from which the duties of the latter must be ascertained (Rec., 95-98), merely makes the Trust Company a depository, and nothing more, and the Guaranty Company retains the right to terminate the agreement at any time and direct the transfer

jurisdiction and appointed appellee, Edwin A. Potter, receiver, the West Virginia receiver (Keatley) filed his petition in the Federal Court. It is also pertinent to remark at this time that W. R. Gilliam, who so filed his petition in the West Virginia court on September 22, 1909, is the same W. R. Gilliam who had theretofore (August 22, 28 and September 1, 1909) come into the Federal Court proceedings at Chicago, filed his claims therein and submitted to the jurisdiction of that court. (Rec., 237.)

Were it at all desirable to further strengthen the discussion on this point, it would be pertinent to refer to the doctrine laid down in *Chesapeake & Ohio Ry. Co.* v. *McCabe,* 213 U. S., 207, and numerous prior decisions of this court therein referred to, that even if jurisdiction had been improperly assumed by the Federal Court at Chicago on February 2, 1909, the West Virginia court could not thereafter, on September 22, 1909, legally enter any order the effect of which was to attack collaterally the jurisdiction theretofore and then being exercised by the Federal Court. And in this connection, and in answer to the contention of counsel for appellant, so frequently and extensively argued in their brief, that there was no dispute or controversy in the Federal Court because the defendant admitted the allegations of the bill and consented to the appointment of the receiver, we have only to refer to *Re Metropolitan Railway Receivership,* 208 U. S., 90, at p. 107.

A further suggestion is also appropriate here, in answer to the contention that the deposit in the

Royal Trust Company was a controlling motive for the litigation, and that the Trust Company did not resist. The deposit in the Trust Company was $566,719.50. (Rec., 113-117.) The total funds collected by Receiver Potter, as shown by his inventory (Rec., 263) was $1,409,234.07. The Royal Trust Company vigorously resisted and contested the attempt by Receiver Potter to secure possession of the deposit held by it. Pages 61 to 125 of the transcript show the proceedings that were necessary before the order could be secured under which the deposit was paid by the Trust Company to Receiver Potter. The demurrer of the Trust Company, filed on February 13, 1909 (Rec., 90) was heard and overruled after protracted argument. On March 6, 1909, the Trust Company was ordered to turn over the deposit to Receiver Potter (Rec., 126-128). That order and all the proceedings antedating it show a serious contest entirely free from the "friendliness" charged by appellant.

The bill in the case at bar alleges the dissolution of the Guaranty Company, and shows that its assets were a trust fund held by the company for the benefit of its creditors and stockholders. Trusts are always the subject of equity jurisdiction. The rule is well settled that upon the dissolution of a corporation a court of equity will entertain a bill to collect and administer upon the assets which by the dissolution become a trust fund, and the creditors and stockholders are the *cestuis que trustent.*

Bacon v. *Robertson,* 18 How., 480.

Olmstead v. *Distilling & C. F. Co.,* 73 Fed., 44.

And this rule was recognized by the Supreme Court of West Virginia in *Stiles* v. *Laurel Fork Oil & Coal Co.*, 47 W. Va., 838, *supra,* where the court said:

> "*Our statute* (Sec. 59, c. 53, Code) *adopts the principles of courts of equity before its adoption, namely, that for some purposes* THE CORPORATION *still owned its property; that is,— First, for the payment of the creditors; and secondly, for the purpose of giving the residue of its assets to the stockholders.*"

To the same effect, see:

> *Miller's Adm'x.* v. *Newburg Orrel Coal Co.*, 31 W. Va., 836.

Counsel also suggest (Br., 45) that all the stockholders of the Guaranty Company were necessary parties, and that two of them, Bigelow and Pitcher, are citizens of Illinois, and are defendants to the action, and therefore defeat the jurisdiction of the court below. The answer to that position is that the record does not show the *citizenship* of Bigelow and Pitcher, and they are not defendants, and are not indispensable parties. The bill does not make Bigelow and Pitcher defendants, and they have come into the suit only by filing their consent to the relief prayed for in the bill and to the appointment of a receiver. (Rec., 254.) Thus, if they could be regarded as parties at all, they would be ranged with the complainants; under no circumstances can they be ranged with, or treated as defendants. This must be so, since, in view of the consent which they filed, there can be and was no possible controversy between them and complainants. Besides, paragraph 13 of the bill (Rec., 7) expressly alleges that it is

filed not only on behalf of complainants, but also on behalf of all other stockholders. The bill is a class bill and for that reason, also, Bigelow and Pitcher were not necessary parties.

Appellant's counsel (Br., 45) also make the naked suggestion that the contract-holders are indispensable parties, but counsel present neither argument nor authority to support the statement. The contract holders have no interest in the controversy, excepting as creditors, and the bill, which was filed by complainants as stockholders and creditors, was filed not only on behalf of all other stockholders, but also on behalf of all other creditors of the company. (Rec., 7.) The record shows that there are 7,219 creditors (Rec., 223) of the Guaranty Company, and we are aware of no decision which makes them indispensable, or necessary or even proper parties.

In *Bacon* v. *Robertson,* 18 How., 480, 489, a bill was filed by a few stockholders for the appointment of a receiver of a dissolved corporation, for the benefit not only of the complainants, but also of all other stockholders. In speaking of the absence of all the stockholders, the court said (p. 489):

> "The number of parties renders it impracticable to bring all before the court, and therefore the suit may be prosecuted in the form which has been employed in this suit. * * * Our opinion is that the plaintiffs have shown a proper case for equitable interposition by the Circuit Court, and that the decree of that court dismissing the bill is erroneous."

Counsel also say (Br., 51) without arguing, that the Federal Court was without jurisdiction because:

> "A stockholders' or creditors' suit *to wind*

> *up the affairs of a corporation of West Virginia,* dissolved under the provisions of Section 57, Chapter 53 Code of that state can be brought *only* in the State Court which decreed the dissolution. So held in *Stiles* v. *Laurel Fork Oil & Coal Co.*, 47 W. Va., 838." (Italics are appellant's.)

We are not concerned with the question of what court may *dissolve* a corporation. The *Stiles* case did not hold that no court outside of West Virginia may administer the assets of a corporation, even though it be dissolved; and, as counsel themselves show (Br., 17), the bill in the case at bar is for an accounting, and the appointment of a receiver to take charge of the property of the Guaranty Company to the end that it may be distributed to those entitled thereto.

All this could be done without in anyway affecting the corporate existence. The mere fact that a corporation is placed in the hands of a receiver, and its property is all distributed, in no way terminates the corporate existence.

Taylor v. *P. & Reading R. Co.*, 7 Fed., 381.
Bank v. *New York Silk Co.*, 11 Fed., 532.
Johnson v. *Loan Assn.*, 99 Fed., 646.
Ohio & M. Ry. Co. v. *Russell*, 115 Ill., 52, 57.
Bartlett v. *Cicero Light, Heat & Power Co.*, 177 Ill., 68, 74.
Bloomfield R. R. Co. v. *Van Silke*, 107 Ind., 480.
Heath v. *M., K. & T. Co.*, 83 Mo., 617, 621.
Paddock v. *Staley*, 13 Col. App., 363.

In the last mentioned case the court said:

"As we look at it the proceedings were not be-

gun for the purpose of winding up or dissolving the corporation, but simply to obtain an accounting between Thompson and the company and put the possession of the property in the meantime in an officer of the court for management and control pending the final decree. *It has many times been decided that a suit of this description is not a dissolution of the corporate capacity or the powers of its officers,* and does not impair or affect the right of its creditors to bring suit for the enforcement of their claims." (Citing authorities.)

The cases cited by appellant such as *Clark* v. *National Linseed Oil Co.*, 105 Fed., 787 (Br., 96, 97) do not militate against the doctrine just stated. The language quoted by appellant's counsel when read in connection with the facts will make this clear.

The fund which the Federal Court was asked to administer upon was a trust fund, and, as such, could be administered upon in a court of equity under the decisions in

Bacon v. *Robinson*, 18 How., 480.

Miller, Adm'x. v. *Newburg-Orrel Coal Co.*, 31 W. Va., 836.

Stiles v. *Laurel Fork Oil & Coal Co.*, 47 W. Va., 838.

Olmstead v. *Distilling & C. F. Co.*, 73 Fed., 44.

Excepting as to the alleged necessity of making the Royal Trust Company and all stockholders and contract-holders defendants, and the alleged impossibility of procuring jurisdiction over the Guaranty Company because of its dissolution, appellant makes no attack upon the jurisidction of the Federal Court to entertain the bill at bar.

Appellant makes some suggestions that the allegations in the bill could not be proven. Thus, he disputes the truth of the allegation that attachments and other proceedings were threatened by creditors, which, if not prevented, would result in inequitable preferences; but those are questions which affect the equity or merits of the bill, and not the jurisdiction of the Federal Court to entertain it. Whether the equities of the case justified the appointment of a receiver by the Federal Court is not a proper question for review on this appeal. That question could only be reviewed on appeal to the Circuit Court of Appeals. (*McLish* v. *Roff*, 141 U. S., 661; *O'Neal* v. *U. S.*, 190 U. S., 36.)

But by arguing the equities of the bill, appellant concedes that the order appealed from involves the merits, as well as the jurisdiction of the court below, and this lends additional support to our contention that the appeal should be dismissed.

II.

THE RECEIVER APPOINTED IN THE WEST VIRGINIA DISSOLUTION PROCEEDINGS WAS NOT A STATUTORY RECEIVER, BUT A MERE CHANCERY RECEIVER, AND HE WAS NOT INVESTED BY STATUTE WITH THE TITLE TO THE PROPERTY OF THE DISSOLVED CORPORATION, OR MADE ITS LEGAL SUCCESSOR.

Under section 58 of the West Virginia statute, the appointment of a receiver is not mandatory, but is entirely within the equitable discretion of the court, and it does not follow at all that because a decree of dissolution is entered, a re-

ceiver must, or will be appointed. The statute provides that upon dissolution, the court "*may,* on application of a creditors or stockholder, appoint one or more persons to be receivers to take charge of and administer its assets; and *whether such receiver be appointed or not,* may make such orders and decrees and award such injunctions in the cause as justice and equity may require." The West Virginia court did appoint a receiver and did make such order as it thought "justice and equity may require." That order, by its express terms, confined the receiver to West Virginia. (Rec., 53.) He had no power or authority whatsoever, by virtue of the order, beyond that state, to represent or appear for the Guaranty Company, or to collect or receive the assets of the company without the State of West Virginia. All the powers of the receiver so appointed were limited to the order to which we have referred, but appellant contends that the receiver so appointed had certain statutory powers and rights outside of and beyond the order appointing him. Where, we ask, are those statutory powers to be found? There is no statute in West Virginia investing the receiver with any power of any kind outside of that contained in the order of his appointment. There is no statute conveying to him title to the property of the dissolved corporation, or directing or empowering him to institute or defend court proceedings in other states, or to collect the assets of the company, or to enforce its rights and contracts. Moreover, as we have shown, the statute provides that all lawful acts may be done by the dissolved corporation, under its

corporate name, with the same effect as before its dissolution, so far as may be necessary or proper for distributing its property and assets, etc., among those entitled thereto, and the statute expressly provides that suits may be brought against the dissolved corporation in its corporate name.

Prior to the enactment of statutes similar to that of West Virginia, courts of equity exercised jurisdiction and appointed receivers of the assets of dissolved corporations. (*Bacon* v. *Robertson*, 18 How., 480.) And the Supreme Court of West Virginia in the *Stiles* case, *supra* (47 W. Va., 838), also recognized the rule that even without a permissive statute suit could be instituted in a court of equity against a dissolved corporation to enforce demands against it. Receivers so appointed are mere chancery receivers, and the receiver referred to in the West Virginia statute has no more or other powers than a chancery receiver who, under the general powers of equity courts, could have been appointed prior to the enactment of such a statute to administer upon the assets of a dissolved corporation.

In *Great Western Mining and Manufacturing Company* v. *Harris*, 198 U. S., 561 (1905), this court held that a receiver is an officer of the court which appoints him, and that in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction even upon the order of the court which appointed him. This court there said (p. 576):

> "In *Quincy, etc., R. R. Co.* v. *Humphrey*, 145 U. S., 82, the powers of a receiver were under

consideration, and the following language was quoted with approval. (p. 98.) 'The ordinary chancery receiver such as we have in this case is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned.' There are exceptional cases, such as *Relfe* v. *Rundle*, 103 U. S., 222, in which the entire property of the insolvent company was vested in the Superintendent of Insurance of the state, where his authority did not come from the decree of the court, and his right to sue was maintained.'

There is no provision whatsoever in the West Virginia statute making any receiver appointed in dissolution proceedings a quasi-assignee of the company, or a successor to, or representative of the company. It must follow that a receiver appointed by the court would be but a mere custodian of it for the court and hence would be simply an ordinary chancery receiver within the ruling of this court in *Great Western M. & M. Co.* v. *Harris*, 198 U. S., 561. And that the receiver referred to in the statute is a mere chancery receiver is the more evident since the statute continues the corporate existence for certain purposes, and provides for conveyances by the corporation, and suits against it under the corporate name. Indeed, section 58, which provides for the appointment of a receiver, specifically applies as well to a foreign as to a domestic corporation, and it can scarcely be contended that a receiver appointed in West Virginia of the assets of a foreign corporation doing business in West Virginia, could take possession of all of the property of such foreign corpo-

ration wherever located, and that such West Virginia statute vested in such receiver title to all the property of the foreign corporation. Yet such would be the logical result of counsel's contention.

If, as is contended by appellant, a receiver appointed under section 58 were a statutory receiver, it would not be necessary, in the order of the court appointing him, to give him any powers whatsoever, as the statute would be the measure of his powers. It is highly significant that counsel for appellant were careful to provide in the order entered in the West Virginia court on September 22, 1909, appointing appellant receiver, that he should have authority to institute and prosecute to final judgment and decree legal proceedings which may be necessary to bring into his custody all the property of the Guaranty Company, wherever found, whether in West Virginia, or some other state (Rec., 180); and it is equally significant that the Guaranty Company was, by the same order, directed to execute a deed for all of its property to the appellant, and in event of failure so to do within fifteen days, a Special Commissioner was appointed to execute a deed for and on behalf of the company. On counsel's theory that the last sentence in section 59 of the statute does not apply to the dissolved corporation, if a receiver has been appointed, it would be impossible for the company to make a conveyance, as directed by the court. It is likewise significant that some of the counsel for appellant in this court should have prayed the West Virginia court in Gilliam's petition, on which the appellant was appointed receiver, "that the jurisdiction of the receiver in

this case be enlarged and extended so as to embrace jurisdiction, control, ownership and management of the entire assets, property and funds of the defendant corporation wherever situated." (Rec., 195.) It is singular also that the order required the receiver, appellant, to furnish a $250,000 bond before taking possession of any property "or acting hereunder." (Rec., 181.)

If the title to the Guaranty Company's property was vested in the receiver, by virtue of the statute, and not by virtue of the order appointing him, then it is strange that when appellant was appointed receiver, September 22, 1909, and the first receiver, Black, was removed, the *Guaranty Company* and not *the first receiver* was directed to convey the property to appellant.

This clearly shows that appellant's counsel and the West Virginia court, notwithstandingly the quotation from its alleged opinion found at p. 77 of counsel's brief, must have thought that the Guaranty Company retained title to its property, notwithstanding the appointment of the first receiver, and also the second receiver.

That appellant is an officer of and dependent upon the West Virginia court for his power and authority is further demonstrated by the fact that appellant could not even have been appointed a receiver had it not been for the removal of Mr. Black, the first receiver. If the receiver is not a creature of and officer claiming power under the order of the West Virginia court, then as the statute makes no provision for removal or the appointment of a

successor, that court would have no power to remove him, and it could not have removed Black; and if Black could not be removed then appellant could not be appointed and is not even a receiver. On the other hand, if Black was subject to removal, and to the orders of the West Virginia court, he must have derived his authority from that court, and if the court had the power to remove him he was not a statutory officer of the character covered by *Relfe* v. *Rundle*, 103 U. S., 222, so frequently cited by appellant.

So, in *Bernheimer* v. *Converse*, 206 U. S., 516, also cited by counsel, the court, at p. 534, makes the distinction we are here showing. The court said:

> "But in each and all of these cases it was held that a chancery receiver having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. *In this case the statute confers the right upon the receiver,* as a quasi-assignee, and representative of the creditors, and as such vested with the authority to maintain an action."

Why place the extraordinary and unnecessary powers found in the order of September 22, 1909, appointing appellant receiver, and prescribe his duties, if title is conferred upon him by the statute and if his powers and duties are defined by statute?

What we have said applies equally to the order of February 1, 1909, wherein the first receiver, Mr. Black, was appointed by the Circuit Court of Kanawha County. That order, as has already been stated, appoints a receiver of only the property of the Guaranty Company within the jurisdiction of

that court, and authorizes him to take all steps necessary to secure possession of that particular property, and expressly provides that "before entering upon the discharge of his duties" he shall give a bond, conditioned according to law. (Rec., 53.)

We must not lose sight of the fact that the West Virginia court was not bound to appoint a receiver, and that whether it appointed a receiver or not, it could make such orders as it deemed equitable, and could appoint "one or more persons to be receivers." The court might have appointed one receiver to take charge of some particular property, and might either have appointed some other receiver, or no receiver at all of other property; and if that be so, it follows that the title must remain in the company until it passes to a receiver.

The statute does not even purport to define any of the duties, obligations or rights of a receiver so appointed. The entire theory of sections 57, 58 and 59 is to provide for a judicial dissolution of a corporation, and also to empower a court, *provided it sees fit so to do,* to appoint one or more chancery receivers, either when a corporation is dissolved, or before its dissolution; and section 59 provides that upon the dissolution of a corporation its assets shall be applied towards the payment of its debts and the expenses of winding up its affairs, the surplus to be distributed among the stockholders. And then, in order that the decree of dissolution should not absolutely deprive the corporation of the right to further exercise any corporate power whatsoever, the legislature provided that, insofar as was necessary to

effectuate a proper distribution of the corporate assets and the protection of its rights, certain designated corporate powers should be continued. No new rights or powers were created by the act, except that a court of chancery was given the power to dissolve a corporation, and certain corporate rights were reserved to the dissolved company. So far as it affects receivers, the statute confers no rights other than a court of equity already inherently possessed in case of dissolved corporations, or other trust estates.

In *Relfe* v. *Rundle*, 103 U. S., 222, principally relied on by appellant, it was held that the Missouri State Superintendent of Insurance, as the statutory successor of a dissolved insurance company organized under the laws of Missouri, could recover funds of the company in Louisiana, as against policy holders in that state who were seeking to retain the funds for the prior benefit of Louisiana creditors. The decision was absolutely and clearly based on the ground that the Superintendent of Insurance was not an officer of the Missouri court, but derived his authority from the Missouri statute. And the decision could not well have been otherwise.

Section 6043 of the Revised Statutes of Missouri, as set forth in the report of that case, provides that:

> "Upon the rendition of a final judgment dissolving a company or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this State, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of

> the creditors and policyholders of such company, and such other persons as may be interested in such assets."

It was with reference to such a statute that this court said, at p. 225:

> "Relfe is not an officer of the Missouri State Court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors and other parties interested. * * * He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence."

By the express terms of the Missouri statute, title to the property, immediately upon dissolution, vests in the superintendent of insurance. No decree of any court is required for that purpose. The West Virginia statute makes no reference to the title of the property of a dissolved corporation, and as we have already said does not even require the appointment of a receiver, but leaves such appointment in the court's discretion, and it further provides that, whether the court appoints a receiver or not, it may make such orders as appear equitable. If the West Virginia court was under no obligation to appoint a receiver, but could leave the property and assets of the company in the possession and control of its Board of Directors, it must also be true that, in carrying out the powers conferred by the statute on that court to make such orders and decrees as equity may require, the court could also appoint a receiver with

limited authority, or a receiver for a particular portion of the property of a dissolved company, or separate receivers for separate parts of the assets, or limit the jurisdiction of its receiver either as to property, or as to territory.

It thus clearly appears that, unlike the Missouri statute, the West Virginia statute provides for no change in the title of a corporation upon the rendition of a decree dissolving the corporation. It is equally clear that if the title to the property of a corporation dissolved by a West Virginia court is changed at all, it must be either by a conveyance from that corporation, or by some decree of court. It cannot be pretended that the title to the property of the Guaranty Company was divested unless and until an order was entered by the West Virginia court appointing a receiver, and a conveyance made to the receiver; and neither the statute nor the order of February 1, 1909, appointing Black receiver even remotely undertake to change the title to any of the company's property. Whatever powers receiver Black had and whatever property rights were vested in him as such receiver, must necessarily be found from the order appointing him.

Nor could the deed of October 9, 1909, (Rec., 136), executed by a special commissioner long after the acquirement of jurisdiction by the United States Circuit Court, and long after the conveyance by deed pursuant to the order of that court, on February 3, 1909, by the Guaranty Company through its president and secretary, of all its property to this appellee as receiver (Rec., 256), be of any avail to affect the possession, custody or control of such prop-

erty already held by appellee under the orders of the United States Circuit Court.

Relfe v. *Rundle* is further distinguishable from the case at bar in that the laws of Missouri did not permit the dissolved company to have any existence after dissolution, or to use its seal, or sue or be sued, etc., Moreover, that case involved an attempt on the part of certain policyholders to secure for themselves preferential rights, whereas, in the case at bar an equitable distribution among all creditors of the Guaranty Company's assets is sought.

Parsons v. *Charter Oak Life Ins. Co.*, 31 Fed., 305, decided by District Judge Shiras, also relied on by appellant, was another case in which an insolvent insurance company was involved, and an effort made by certain policyholders to procure preferential payments. The insurance company was organized under the laws of Connecticut, which *required* the insurance commissioner to petition the court for the appointment of a receiver of an insolvent insurance company, and for the cancellation of its charter, and the court held that neither the statute of Iowa, where the litigation was begun, nor those of Connecticut, the domicile of the company, permitted of such priority. Under the Connecticut statute (Gen. Stat. Conn. 1888, Sec. 2869), it was mandatory upon the court to appoint a receiver where the assets were less than three-fourths of its liabilities.

Moreover, under the Connecticut law, after the dissolution and the appointment of a receiver, the insurance company could no longer sue or be sued, and it had no continued corporate existence.

Like comment applies to *Fry* v. *Charter Oak Life Ins. Co.*, 31 Fed., 197, cited, but not quoted from in appellant's brief.

In *Pendleton* v. *Russell*, 144 U. S., 640, cited by appellant, an insurance company organized under the laws of New York was dissolved under the New York statute by a proceeding brought on behalf of the people, by the attorney general of that state. The New York statute did not, as in the present case, authorize the use of the corporate name or corporate seal, or permit the institution of suits by or against a dissolved insurance company, or permit the continued corporate existence for any period whatsoever, as does the West Virginia statute. This distinction applies to all the cases that arose in New York, to many of which counsel for appellant refer.

So, *American National Bank* v. *National Benefit & Casualty Company*, 70 Fed., 420, cited by appellant, is another case of an insurance company which had been dissolved by a proceeding instituted by the attorney general of Wisconsin, where the company was organized. A decree of dissolution was entered and a receiver was appointed. Thereafter, a suit was begun in Colorado by a creditor seeking to have certain funds in that state applied in priority to his claim, and the court denied such relief. Under the Wisconsin statute, the existence of the insurance company is not continued for any purpose after its dissolution, and the statute makes it mandatory that its affairs shall be wound up under the direction of the receiver.

So, also, in *Nelson* v. *Hubbard*, 96 Ala., 238, cited

by appellant, the Alabama statute expressly provides that upon a decree of dissolution, the chancellor "*shall* appoint a receiver of all the property and assets of the corporation," and the statute therein further provides: "The chancellor *shall* direct the receiver to collect by suit or otherwise all the debts due the corporation, and sell property, real or personal, belonging to the corporation, and how he shall make the title thereto to the purchaser." This statute is mandatory as to the appointment of a receiver, and does not leave to the court any discretion as to the powers which shall be granted to such receiver so appointed.

In *Groom* v. *Mortimer Land Co.*, 192 Fed., 849, also relied on by appellant, a New Jersey corporation was voluntarily dissolved pursuant to the laws of that State, with the consent of its stockholders. The New Jersey statute made the directors of the dissolved company its trustees in liquidation, and also provided for the appointment of a receiver to liquidate the company in lieu of the trustees. A receiver was appointed by the New Jersey court upon the application of the trustees, and a deed of conveyance was made to the receiver by the corporation and its statutory liquidating trustees, so that title to all the assets was vested in the receiver. *After* all these steps had been taken, one of the stockholders who had consented to the dissolution proceedings, filed a bill against the company in a Texas State Court "for the winding up of the defendant corporation" and other relief. The Circuit Court of Appeals held that notwithstanding the dissolution of the company, it nevertheless could remove

the case to the Federal Court, inasmuch as the New Jersey statute perpetuated the corporative existence of a dissolved company "for the purpose of prosecuting or defending suits by or against them." On demurrer to the bill the court held that the bill would not lie for the following reasons: it was not filed by a creditor, but by a stockholder who had consented to the company being wound up under the New Jersey laws; the title to the Texas property had already been vested in the New Jersey receiver; and the receiver, under the New Jersey statutes, was more than an officer of the court appointing him, but was an alternative agency *designated by the State statute* as trustee to wind up the affairs of the dissolved company.

Counsel for appellant also refer to the case of *Swing* v. *Bentley & Gerwig Furniture Co.*, 45 W. Va., 283, 285, as though it involved the construction of the West Virginia statute. The language quoted by counsel refers only to the powers which receivers will be permitted to exercise in foreign states on the principle of comity.

But we need not look to the law of West Virginia to determine what this principle of comity is, inasmuch as this court has settled that question in *Great Western Mining Co.* v. *Harris*, 198 U. S., 561, *supra.*

Counsel's entire argument must fall unless the first receiver, Mr. Black, had title to the property in controversy. If he had no title, then it is clear that the title vested in appellee on February 1, 1909, by virtue of his appointment as receiver and the Guaranty Company's conveyance to him. Manifestly,

the order entered eight months thereafter by the Circuit Court of Kanawha County, appointing appellant receiver, could have no *ex post facto* effect.

In order to support the contention that title vested in receiver Black on February 1, 1909, appellant is driven to rely upon the theory that Black was a receiver in whom title was vested by statute and not by order of court. Indeed, counsel's entire argument is predicated upon that theory, and in view of the West Virginia statute it is somewhat surprising that counsel should expressly adopt (Br., 59) the definition of statutory receivers found in Alderson on Receivers, p. 4, to the effect that they are receivers whose powers are derived from special statutory provisions, *to which statutory provisions they must look for guidance in the performance of their duties*. Here, we submit, appellant will look in vain for statutory provisions to guide him.

III.

EVEN IF THE WEST VIRGINIA RECEIVER WERE A STATUTORY RECEIVER, NEVERTHELESS HE ACQUIRED NO TITLE TO PROPERTY BEYOND THE JURISDICTION OF THE COURT APPOINTING HIM, INASMUCH AS THE ORDER APPOINTING HIM EXPRESSLY LIMITED HIS AUTHORITY TO THAT JURISDICTION.

Counsel argue (Br., 76) that the West Virginia court had no power, when it appointed its first receiver, to limit the receivership to property within the jurisdiction of that court. The argument of counsel, though not entirely clear to us, seems to be based, at least in part, upon the theory that the limitation upon the receiver's powers was not to the ad-

vantage of the company's creditors, and should therefore have been omitted from the order. We shall not waste time in answering such a contention, as we are not here dealing with the advisability, or propriety of the restriction. That the court had the power to appoint a receiver of only the property within the jurisdiction of the court, is we believe, perfectly clear. Section 58 of the statute provides that the court, when decreeing a dissolution, whether a receiver be appointed or not, "may make such orders and decrees and award such injunctions in the cause as justice and equity may require." Thus, it is as clear as language can make it that the court had all the powers of a court of chancery, and could decree a dissolution, and, in its discretion, appoint no receiver, or appoint one or more persons to be receivers, and under any and all circumstances the court could enter such orders as, in its judgment, justice and equity might require. Notwithstanding these unlimited powers of the court, counsel without argument or the citation of a single authority, boldly assert that the limitation of the receiver's authority was, in effect, an amendment of the statute and beyond the power of the court. We believe that the language of Circuit Judge Kohlsaat, upon this point completely answers counsel's contention, and that (Rec., 286) "it would be a strained construction of the Act to hold that the receiver, being appointed, could shake off the conditions upon which he secured the appointment and lay claim to authority expressly withheld from him by the order. It could, with equal justification, be claimed that the order was either good as entered, or void *in toto*."

The West Virginia court having had the power to appoint a receiver of only the property located within its own jurisdiction, it must follow that even if the receiver so appointed were a statutory receiver, the title to property beyond the jurisdiction of the West Virginia court did not pass to the receiver; and this brings us to a consideration of the legal situs of the property.

IV.

THE LEGAL SITUS OF THE PROPERTY HERE INVOLVED IS IN ILLINOIS AND NOT IN WEST VIRGINIA. AS THE WEST VIRGINIA COURT APPOINTED A RECEIVER OF ONLY THE PROPERTY WITHIN ITS JURISDICTION IT FOLLOWS THAT SUCH RECEIVER COULD ACQUIRE NO TITLE TO ANY OF THE PROPERTY IN CONTROVERSY.

The record shows that the assets of the Guaranty Company consist of cash, securities, bills receivable, loans, certificates of deposit, bonds, accounts receivable, notes, mortgages, certificates of stock and "other assets." (Rec., 26, 101-105, 142, 256, 263, 264.) This is practically conceded by counsel. (Br., 66, 75.) Counsel, however, claim (Br., 66, 75) that all the assets were personalty and intangible chattels. The report of appellee (Rec., 262-265) shows that he filed an itemized and detailed schedule of assets of liabilities, and while the schedule itself does not appear in the transcript, yet the order appointing appellee receiver made him receiver of all the property of the Guaranty Company "real, personal and mixed" (Rec., 57) and the deed executed by the company to appellee transferred, *inter alia*, all its property, "real, personal and

mixed" (Rec., 256), and in like manner an order entered in the case at bar on February 4, 1909, referring the cause to a master in chancery to take testimony to enable appellee to ascertain the character and locality of property belonging to the Guaranty Company covers "real" property. (Rec., 257.)

Both on the record, therefore, as well as from knowledge of the actual facts, we are constrained to dispute the statement of counsel that the property here involved consists only of personalty and intangible chattels. That the situs of real estate is in the state where located will not be disputed, and the mere fact that the property in controversy includes real estate is, of itself, a sufficient and complete answer to the argument of counsel (Br., 66) that "all the property and assets of such Guaranty Company at the time of such appointment (of a receiver) were within the jurisdiction of such Circuit Court of Kanawha County."

It is not disputed by appellant that the notes, bonds, certificates of deposit, mortgages, certificates of stock and securities belonging to the Guaranty Company were, at the time that the West Virginia receiver was appointed, and since then always have been, held at the Chicago office of the Guaranty Company.

The Company's charter expressly provided that it "shall keep its principal office or place of business at Chicago, in the County of Cook and State of Illinois" (Rec., 149), and all the company's business was transacted from and its personal property was kept in that office. (Rec., 28.) The bill of complaint filed

in West Virginia (Rec., 28) shows—and this is nowhere disputed—"that all of the property and effects of said Guaranty Company are in said City of Chicago, except a few cash balances in little more than nominal amounts due to said Guaranty Company from about fifteen banks outside of Chicago, which have been collecting agents of said Guaranty Company." Our contention is emphasized by the fact that at a stockholders' meeting held in Chicago January 12, 1898, the company's name was changed from "The American Investment Guaranty Company" to "American Guaranty Company of Chicago." (Rec., 34.)

The record also shows that at the time of its dissolution the Guaranty Company had loaned to various of its contract holders an amount aggregating over four hundred thousand dollars, all of which loans are evidenced by notes of contract holders, which notes are payable (Rec., 63), by their express terms at the office of the Guaranty Company in the City of Chicago. (Rec., 75.)

From the condensed statement of assets (Rec., 263) it appears that among them were many hundred thousand dollars of simple contract debts, and the situs of such debts is, according to the decision of this court, at the domicile of the debtors and not of the creditor, for purposes of administration.

In *Wyman* v. *Halstead*, 109 U. S., 654, 656, this court said:

> "The general rule of law is well settled that for the purpose of founding administration all simple contract debts are assets at the domi-

> cile of the debtor, and that the locality of such a debt for this purpose is not effected by a bill of exchange, or a promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable." (Citing many authorities.)

Counsel cite and rely (Br., 68) on *Railway Co.* v. *Sturm*, 174 U. S., 710, as laying down a doctrine different from that announced in *Wyman* v. *Halstead* (*supra*), but a reading of the Sturm case shows that the court reaffirmed the doctrine of the Wyman case and again held that for the purpose of administration all simple contract debts are assets at the debtor's domicile and not at the domicile of the creditor. That case also recognizes a distinction in the doctrine when applied to taxation and refers to *Kirtland* v. *Hotchkiss*, 100 U. S., 491, relied on by appellant (Br., 67, 68), as coming within that class. In *Blackstone* v. *Miller*, 188 U. S., 189, the court held that for purposes of taxation there is no distinction between the situs of a tangible chattle and a debt due from a bank because of money deposited therein. In *State Board of Assessors* v. *Comptoir National D'Escompte*, 191 U. S., 388, the court held that a state could tax property in the shape of securities evidenced by notes or obligations held within that state for purposes of collection by an agent of a non-resident owner. These cases teach that for purposes of taxation, intangible property, such as notes, credits, etc., may be taxed either at the place where such debts are owing, or the evidences thereof are lo-

cated, or at the place of the owner of such assets, or at both places.

These cases demonstrate that as a matter of fact a debt is *actually* located and constitute assets where the debtor resides, even though, by a fiction of law, may also be taxed at the domicile of the owner. In other words, while a debt, like tangible personal property may be taxed at other places, it, like tangible personal property, has its actual *situs* at the place where it must be recovered. In the present case, if instead of the debts involved there had been, for example, cattle in Illinois belonging to the corporation, no one would contend for a minute that the West Virginia court had assumed jurisdiction of the same in the face of its order limiting its jurisdiction to assets in West Virginia. But the debts here, are, under the doctrine of the cases, *supra,* no more assets actually located in West Virginia than the cattle in the suppositious case, and the debts are, to the same extent, expressly excluded by the order of the West Virginia court as if they were in their nature tangible.

> "When logic and policy of a state (here the West Virginia order, as interpreted by appellant) conflict with a fiction * * * the fiction must give way." (*Blackstone* v. *Miller, supra.*)

In *New England Mutual Life Ins. Co.* v. *Woodworth,* 111 U. S., 138, the court again reaffirmed the doctrine of *Wyman* v. *Halstead* (*supra*), and held that a policy of insurance, not under seal, is, for the purpose of founding administration, an asset where the debtor resides. That case is also an authority for the statement that debts cannot be collected by

an administrator appointed in a state foreign to that where the debtor resides or can be found, and for that reason the situs of a simple contract debt is that of the debtor. So, in the case at bar, all the notes evidencing loans by the Guaranty Company to its contract holders are secured by the deposit of the contracts of the Guaranty Company, all of which pledged contracts were held at the Chicago office of the Guaranty Company. (Rec., 75, 26.)

In *Buck* v. *Beach*, 206 U. S., 392, 403, the court recognized the rule that where bonds are a part of an estate administration could be had at the place where they are found, regardless of the location of either the debtor or the creditor. The funds here in controversy include several hundred thousand dollars of bonds. (Rec., 101.) In *Selliger* v. *Kentucky*, 213 U. S., 200, 204, the court held that "bonds can be taxed where they are permanently kept."

Included among the assets in the possession of the federal receiver are, also, as admitted by counsel (Br., p. 75), various certificates of stock. In *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S., 1, the court laid down the rule that the situs of certificates of stock may, for purposes of taxation, be in one place, and yet they may have a different situs where a question of ownership is involved. In the latter case, the court said that the certificates of stock are only evidence of ownership, and that the property represented by the certificates will be deemed to be located at the domicile of the corporation.

There is no claim made by appellant that the certificates of stock here in controversy were issued by West Virginia corporations, and it is clear there-

fore, that the certificates in controversy were not within the jurisdiction of the West Virginia court.

In view of the character and location of the property here involved and of the decisions *supra*, it is plain that the West Virginia receiver, whose powers were expressly limited to the property within the jurisdiction of the court appointing him, had absolutely no right to claim any of the property in question, and that it vested in appellee by virtue of his appointment as receiver, and the Guaranty Company's deed of assignment to him.

V.

APPELLANT'S CHARGE OF BAD FAITH IS WITHOUT ANY JUSTIFICATION IN FACT, AND IS WHOLLY IMMATERIAL, AS A MATTER OF LAW.

Counsel complain because the complainants in the West Virginia suit were not content to have all the assets of the Guaranty Company administered by a receiver appointed by a West Virginia state court, but sought such administration by a receiver appointed by the Federal Court, and counsel draw inferences therefrom and discuss the matter "in a way which," they themselves say, is "distasteful."

It is, we believe, a sufficient answer to this complaint to say that the motive which actuates a litigant in selecting a particular forum, is wholly immaterial. The test of the Federal Court jurisdiction is not dependent upon the motive of the party invoking it.

In *Blair* v. *Chicago,* 201 U. S., 400, in disposing of a similar contention, this court said (448):

> "As to the conspiracy to get the case into the Federal Court with a view to the decision of the rights of the parties therein, we are not aware of any principle which prevents the parties having the requisite citizenship and a justiciable demand from seeking the federal courts for redress, if such be their choice of a forum in which to have the contested rights litigated. Having a proper cause of action and the requisite diversity of citizenship confers jurisdiction upon the federal courts, and in such cases the motive of the creditor in seeking federal jurisdiction is immaterial." (Citing authorities.)

In that case, also, as in the instant case, complaint was made that various court proceedings were carried on pursuant to a pre-arranged plan. In speaking of that objection the court said (p. 449):

> "It is true that the judgments were taken and the receivers appointed on the same day, and it is quite likely that the receiverships were in view when the judgments were taken, and that preparations had been made in that direction, but we perceive in this no legal objection to the jurisdiction of the court."

In *South Dakota* v. *North Carolina,* 192 U. S., 286, the court, at p. 311, approvingly quoted the following language of Mr. Justice Brown, in the opinion in *Dickerman* v. *Northern Trust Co.,* 176 U S., 181:

> "If the law concerned itself with the motives of parties, new complications would be introduced into suits which might seriously obscure their real merits."

In *In Re Metropolitan Railway Receivership,* 208 U. S., the court said (pp. 107, 111):

> "That the parties preferred to take the subject matter of the litigation into the federal courts, instead of proceeding in one of the courts of the state is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal Court attached the motive for bringing the suit there is unimportant." (Citing authorities.)

Counsel's entire charge of bad faith is predicated upon the fact that complainants filed a bill in the West Virginia court for the purpose of winding up the company and praying for the appointment of a receiver, and in fact procured an order which limited the receiver's powers to property located within West Virginia, and thereafter commenced proceedings in the Federal Court in Illinois for the purpose of administering that part of the assets of the Guaranty Company located within the jurisdiction of that court.

It cannot even be claimed that the West Virginia court was not fully advised of complainant's purpose. An answer, sworn to by two persons, has been filed to the intervening petition of appellant. (Rec., 216-226; especially, p. 217.) No reply to, or denial of that answer has been filed by appellant or by any other person. That answer explicitly and unequivocally sets up that on February 1, when the West Virginia court entered the order appointing V. L. Black receiver, the attention of the court was expressly directed to the fact, not only that the order appointing the West Virginia receiver confined his power to that state, but that the parties contemplated and had planned at once to follow up the West Virginia proceedings with an application

to the Federal Court, where the property of the Guaranty Company and also its principal office were located, for the appointment of a receiver by that court. This record shows that the West Virginia court had full notice of the plan actually pursued, before he entered the order of February 1, and counsel so concede. (Br., 53.)

We know of no principle or authority, and counsel have referred us to none, which rendered such a plan illegal, or even questionable. It not being necessary that any receiver he appointed by the West Virginia court no complaint can be made because one was appointed with only limited powers. It is evident that inasmuch as the West Virginia statute created no statutory receiver and gave no receiver title to the property of the Guaranty Company, it was absolutely essential that appropriate proceedings be instituted in the place where the company's assets were actually located and could be procured for administration purposes.

Inasmuch as the assets were located within the jurisdiction of the Federal Court sitting in Illinois, it was entirely proper, and indeed necessary, in order to procure an equitable distribution of the company's assets, that a receiver be appointed in that jurisdiction; and as the amount involved was sufficient, and the requisite diversity of citizenship *bona fide* existed, it was proper to invoke the jurisdiction of the Federal Court.

When the Federal Court, on February 2, 1909, appointed appellee receiver, there was no prior order of any court appointing a receiver of any property of the Guaranty Company outside of West Vir-

ginia, and receiver Black would have been powerless, and if the Federal Court had not then acted, the property of the company would have remained in the control of a dissolved corporation, and subject to attempts to procure preferences, and subject to attachments, disintegration and destruction, by numerous adverse and conflicting proceedings.

On February 2, 1909, there was and could be no conflict between the order of the West Virginia court entered on February 1, 1909, and that entered in the Federal Court on February 2. If the West Virginia court had taken no further action, the present conflict would never have arisen, and it is clear that the West Virginia court could not, by any order entered after the Federal Court had taken jurisdiction, interfere with, or deprive it of the jurisdiction which it had already taken by an order entered before the West Virginia court acted.

When, on September 22, 1909, the West Virginia court entered an order attempting to appoint appellant receiver of all the property of the Guaranty Company, no matter where located, the Federal Court had already for more than eight months been in possession thereof. During all that time the Federal Court had been continuously administering upon the estate, had entered many important and far-reaching orders, and disposed of a sharp controversy with the Royal Trust Company; besides 7,219 claims were filed with the Master in Chancery, pursuant to the order of the Federal Court, which are in course of adjudication by that court. The cash and securities in possession of appellee, as shown by the in-

ventory filed by him on March 26, 1909, were $1,409,234.07. (Tr., 263.)

It is noteworthy that among the claims so filed were claims filed on August 24, 28, and September 1, 1909 (Rec., 237), by W. R. Gilliam, upon whose petition to the West Virginia court appellant was appointed receiver on September 22. By the filing of those claims the jurisdiction of the Federal Court was expressly recognized by Gilliam. And, *mirabile dictu*, the claims of Gilliam were filed in the Federal Court at Chicago by Messrs. F. W. Houghton and George B. Edgerton (Rec., 237), and those same gentlemen, together with Messrs. Chilton, MacCorkle and Chilton appeared for Gilliam on the application in the West Virginia court for the removal of Black and the appointment of Keatley on September 22, 1909 (Rec., 196). And all of those learned lawyers appear also in this court on behalf of appellant Keatley.

In fact, of the 86 claimants referred to in the Gilliam petition in the West Virginia court, 69 had already filed their claims with the Master in Chancery of the Federal Court at Chicago. (Rec., 224.) And none of those 86 claimants, nor even Gilliam, was, or is a citizen of West Virginia. And the total surrender value of all West Virginia contracts is only $9,751.44. (Rec., 28.)

Eight months before the West Virginia court appointed appellant, or authorized any receiver to take possession of any property outside of the jurisdiction of that court, the Federal Court had already taken jurisdiction over the *res*, and the court which has first taken jurisdiction over the *res* will

maintain such jurisdiction as against any other court asserting jurisdiction by virtue of a subsequent proceeding. (*Farmers Loan & Trust Co.* v. *Lake St. El. R. R. Co.*, 177 U. S., 51.)

If, as we contend, the West Virginia statutes do not provide for a statutory receiver, and if, as appellant claims, the situs of the property was within the jurisdiction of the West Virginia court, then there would be involved merely a question of conflict of jurisdiction, that is to say, even assuming that the West Virginia court had directed a receiver in Chancery to take possession of the property, such fact could not oust another court of *jurisdiction* to take the property.

The present case is very much like *In re Cleland*, 218 U. S., 120, where a claimant sought to attack the jurisdiction of the Federal Court sitting in the Eastern District of Michigan which, in a consent proceeding, had appointed a receiver of a building association and was administering upon its estate. There, as here, in the language of the court, the petitioner sought "to reduce all the proceedings to naught. * * * His pecuniary interest in doing so is infinitessimal, even if not actually contravened. It cannot be believed the motive for the petition is such as to appeal to the discretion of the court."

It is respectfully submitted that there is no merit in the appeal, and that in the event that appellee's motion to dismiss the appeal be disallowed, the order appealed from should be affirmed.

Respectfully submitted,

LEVY MAYER,
Attorney for Edwin A. Potter, Receiver.

CHICAGO, December 4, 1912.

Office Supreme Court, U. S.
FILED.
DEC 14 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 84.

EDWIN M. KEATLEY, AS RECEIVER OF AMERICAN GUARANTY COMPANY OF CHICAGO, UNDER APPOINTMENT OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, APPELLANT,

vs.

CARRIE REBECCA FUREY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF CHARLES LA TOUR FUREY, DECEASED, AND ALSO IN HER OWN RIGHT; EDWIN A. POTTER, AS RECEIVER OF THE AMERICAN GUARANTY COMPANY OF CHICAGO, BY APPOINTMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, ET AL., APPELLEES.

THE WEST VIRGINIA STATUTES.

LEVY MAYER,
Attorney for Appellee Edwin A. Potter, as Receiver of the American Guaranty Company of Chicago.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 84.

EDWIN M. KEATLEY, AS RECEIVER OF AMERICAN GUARANTY COMPANY OF CHICAGO, UNDER APPOINTMENT OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA, APPELLANT,

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CARRIE REBECCA FUREY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF CHARLES LA TOUR FUREY, DECEASED, AND ALSO IN HER OWN RIGHT; EDWIN A. POTTER, AS RECEIVER OF THE AMERICAN GUARANTY COMPANY OF CHICAGO, BY APPOINTMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, ET AL., APPELLEES.

THE WEST VIRGINIA STATUTES.

The bill filed in the Circuit Court of Kanawha County, West Virginia, is on pages 23 to 28 of the printed record. Paragraph 4 of that bill (R., 24-25), gives the name, the date of the charter, the capital stock, the purposes for which organized,

and the period of existence of the Guaranty Company, and concludes thus (R., 25) "that a true and correct copy of said certificate of incorporation *and of all amendments thereto,* is hereto attached as Exhibit 'B' and by express reference thereto made part hereof."

Exhibit "B" (R., 32-36) is the original charter of July 14, 1892, and the amendment of January 12, 1898, and the amendment of April 27, 1901. The charter provides (R., 33) thus: "Which corporation shall keep its principal office or place of business at Chicago, in the county of Cook and State of Illinois, and is to expire on the first day of July, A. D. 1942." (The printed record at page 23, by a typographical mistake, reads "1904." This same Exhibit "B" appears again in the record, pages 248 to 252, and on page 249, eighth line, the correct date, "1942," is given.)

The amendment of January 12, 1898, to the charter was adopted, as the amendment recites (R., 34), "at the annual meeting of the stockholders of The American Investment Guaranty Company held at room 54, Brother Jonathan Building, Numbers 2 and 4 Sherman street, Chicago, on the twelfth day of January, 1898." At that meeting, and by amendment of the charter then adopted, "the name of the corporation shall be American Guaranty Company of Chicago, instead of The American Investment Guaranty Company" (R., 34).

"An exhibit (to the bill) prevails as against an inconsistent averment in the bill" (16 Cyc. of Law and Procedure, 237, and the cases there cited).

In the reply brief of counsel for appellant occurs the following (pp. 9 and 10):

> "Counsel for appellee is asked to answer the following question: If, as stated on page 42 of counsel's brief, 'The Company's charter expressly provided that it shall keep its principal office or place of business in the city of Chicago, in the County of Cook, and State of Illinois,' why did they allege in the bill filed in West Virginia,
>
> '5. That the principal office of said Guaranty Company ever since its incorporation always has been, and is, in the city of Charleston, in said Kanawha County, in the State of West Virginia'? (Rec., p. 25).
>
> "For fear counsel shall not answer this question we suggest that the reason is found in the provisions of section 57, which provides that those stockholders, of not less than one-third in interest, of the corporation, who *desire to wind up its affairs*, may apply by a bill in chancery to the circuit court of the county in which the *principal office* or place of business is situated.
>
> "Which is the truth?
>
> "To give that court jurisdiction these two things were necessary: 1st, to apply to the court in the *county* where the *principal office* was situated, and, 2d, they must desire to wind up the affairs of the corporation." (Italics are theirs.)

The West Virginia Statutes.

Sections 57, 58, and 59 of chapter 53 of the Code of West Virginia are printed in full on pages 5 to 7 of appellees' motion to dismiss the appeal.

Section 57 provides:

> "If not less than one-third in interest of the stockholders of a corporation desire to wind up its affairs they may apply by a bill in chancery *to the circuit court of the county in which the principal office or place of business of such corporation is situated,*" etc.

Section 58 provides:

> "When a corporation expires, or is dissolved, or before its expiration or dissolution, upon sufficient cause being shown therefor, *such court* (circuit court of the county in which the principal office or place of business of such corporation is situated), as is mentioned in the preceding section, may, on application of a creditor or stockholder, appoint one or more persons to be receivers," etc.

Section 59 provides:

> "When the corporation shall expire or be dissolved its property and assets shall, under the order and direction of the board of directors then in office, or receiver or receivers appointed for the purpose by *such circuit court* (of the county in which the principal office or place of business of said

corporation is situated) as is mentioned in the fifty-seventh section of this chapter, be subject to the payment of the liabilities of the corporation." etc.

The Code, chapter 54, section 23, as amended in 1901, provides:

> "The stockholders or directors of any corporation formed under or accepting the provisions of this chapter may hold meetings for the transaction of the lawful business of the corporation, including the first general meeting for purposes of organization, and *keep the principal office of such corporation either in or out of this state.* * * * *The principal office of a corporation shall be taken and deemed to be at the place fixed by the agreement and the certificate of incorporation, or as located according to the provisions of section twenty-one of this chapter.* * * *"

Section 21, above referred to, provides for a change of the place of its principal office by a stockholders' meeting at which a majority shall be present, "provided that notice be given by advertisement published at least two weeks before such action in some newspaper of general circulation *printed in the county wherein the principal office of such corporation is located, if such office be within this state; and if such office be not within this state, then in some newspaper printed at the capital of this state*, of the intention to offer such resolution * * *."

The same section, which refers to an increase of capital stock, provides further, thus:

> "But on such increase *a resident corporation* shall not pay less than five dollars and *a non-resident corporation* shall not pay less than ten dollars."

The Code, chapter 54, as amended in 1887, which has reference to the appointment of an attorney to accept service of process, provides:

> "Every such corporation having its principal office or place of business in this state shall, within thirty days after organization, by power of attorney duly executed, appoint some person *residing in the county in this state wherein its business is conducted*, to accept service. * * * Every such corporation *having its principal office or place of business outside this state* shall, within thirty days after organizing, by power of attorney duly executed appoint *some person residing in this state to accept service* on behalf of said corporation. * * * The said power of attorney shall be recorded in the office of the clerk of the county court of the county *in which the attorney resides*, and filed and recorded in the office of the Secretary of State * * *."

By the Code, chapter 32, section 124, as amended in 1905, the statute in making a classification for the purposes of taxation provides:

> "* * * Domestic corporations are subdivided into two classes, resident and non-resident. A resident corporation is a do-

mestic corporation whose principal place of business and chief works (if it have chief works) are located within this state, and *a non-resident corporation is a domestic corporation whose principal place of business or chief works is located without this state* * * *."

The laws above quoted can be conveniently found on pages 23, 24, 33, 34, and 152 of an official pamphlet entitled "General Corporation Laws of West Virginia," collated by C. W. Swisher, Secretary of State, published at Charleston in 1905.

The order of February 1, 1909, entered by the West Virginia court (R., 53) appointing Black receiver contains no finding either of jurisdiction or as to the principal office or place of business of the Guaranty Company, or its location.

In the order of September 22, 1909 (R., 179-182), entered by the West Virginia court, which removed Black and appointed Keatley receiver and enlarged the February 1, 1909, order from a receivership of the property in West Virginia to a receivership within and without the State of West Virginia, and also ordered the Guaranty Company to make a deed of conveyance to Keatley, there was no finding of jurisdiction and no finding with reference to the principal office or place of business of the Guaranty Company, or its location.

In the petition filed in the West Virginia court by W. R. Gilliam (R., 183-197), and upon which

petition the order of September 22, 1909, appointing Keatley receiver was entered, it is alleged (R., 183) "that the principal administrative offices of said defendant company have always been in the city of Chicago, in the State of Illinois, and upon information and belief, that all the officers and stockholders of said defendant *have continuously resided at and have always done business for said company from said city of Chicago.*"

All the property and effects of the Guaranty Company were situated in the city of Chicago (R., 6, 130).

In view of the foregoing, I reply to the question which counsel for appellant have asked me to answer, that the West Virginia court was without jurisdiction to appoint Black on February 1, 1909, or Keatley on September 22, 1909, because, under the statutes, the circuit court of Kanawha county was without jurisdiction, and "because it (the bill) was not (filed) in the circuit court of the county in which the principal office or place of business of such corporation is situated."

Respectfully submitted,

LEVY MAYER,
Attorney for Appellee
Edwin A. Potter, as Receiver.

WASHINGTON, D. C.,
December 13, 1912.

FILED.
APR 3 1911
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. [redacted] 84.

EDWIN M. KEATLEY, as Receiver of American Guaranty Company of Chicago under appointment of the Circuit Court of Kanawha County, West Virginia,
Appellant,

vs.

CARRIE REBECCA FUREY; EDWIN A. POTTER, as Receiver of The American Guaranty Company of Chicago, by appointment of the Circuit Court of the United States for the Northern District of Illinois, et al.,
Appellees.

REPLY BRIEF ON BEHALF OF EDWIN A. POTTER AS RECEIVER IN SUPPORT OF THE MOTION TO DISMISS THE APPEAL.

LEVY MAYER,
Attorney for Edwin A. Potter, Receiver.

GUNTHORP - WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 612

EDWIN M. KEATLEY, as Receiver of American Guaranty Company of Chicago under appointment of the Circuit Court of Kanawha County, West Virginia,
Appellant,

vs.

CARRIE REBECCA FUREY; EDWIN A. POTTER, as Receiver of The American Guaranty Company of Chicago, by appointment of the Circuit Court of the United States for the Northern District of Illinois, et al.,
Appellees.

REPLY BRIEF ON BEHALF OF EDWIN A. POTTER AS RECEIVER IN SUPPORT OF THE MOTION TO DISMISS THE APPEAL.

To the lengthy briefs (127 pages) filed on behalf of appellant we wish to make a very short reply.

Section 59 of the West Virginia Code is not fairly quoted on pages 6 and 7 of appellant's brief. It is *not* divided into two sections as counsel would have it appear. Furthermore, appellant has omitted this clause:

"* * * under the common seal or other

wise, and all lawful acts be done in the corporate name in like manner and *with like effect as before such dissolution or expiration* * * *." (The Statute is set out in full in our opening brief, pp. 5-7.)

I.

We contend that two matters were under consideration by and were passed upon by the Circuit Court, viz: (1) The prayer of the intervening petition of Keatley; (2) Keatley's oral motion for an order directing the Federal receiver (E. A. Potter) to turn over the property and assets of the Guaranty Company in his hands to Keatley, the State Court receiver. The decree from which the appeal is taken finds not alone that there is no equity in the intervening petition and denies the prayer thereof, but also finds that there is no equity in the motion made by Keatley and overrules the same. (Rec., 287.) The motion made by Keatley as the West Virginia receiver to have the funds turned over to him, does not at all involve a jurisdictional question, for such a motion is a recognition of the jurisdiction of the Federal Court, and is not infrequently made by a domiciliary receiver when he requests the Court of another jurisdiction to turn over to the courts of the domicile of the corporation the administration of its assets and property. (And such a case in principle was that of *Louisville Trust Co.* v. *Knott*, 191 U. S., 225.) The granting of such a motion by the Federal Court would be a matter solely within its

equitable jurisdiction. Even assuming that the intervening petition alone does present a jurisdictional question (which we deny), it is apparent, since the decree appealed from is based not only on the prayer of the intervening petition, but also on the motion of the appellant, that there is no single definite issue of jurisdiction presented by the record. This court has held that in the absence of a certificate of jurisdiction,

> "the record must definitely and unequivocally show that the Court below sends up for consideration a single and definite question of jurisdiction." *Huntington* v. *Laidley*, 176 U. S., 668; *Courtney* v. *Pradt*, 196 U. S., 89.

Appellant's counsel attempt to minimize the effect of the motion so made by appellant, by arguing that the motion would have had no purpose or effect if the Court below had jurisdiction. (Appellant's brief, page 65.) Counsel overlook the fact that such motion could be and was consistently made with an admission of jurisdiction. In the interests of comity courts frequently turn the administration of the assets of a corporation over to the domiciliary receiver. The motion could be in no sense, and was not a corollary to the prayer of the intervening petition, but was an entirely independent proceeding. The appellant, too, has specifically assigned error, not alone upon the overruling of the prayer of the intervening petition, but also upon the overruling of the motion. (Rec., 289.) In all cases cited or we think that can be cited by appellant where this Court has sustained an appeal wherein no certificate of jurisdiction was obtained, this Court expressly stated that it

appeared upon the face of the record that the only question decided below was a single definite question of jurisdiction.

II.

Appellant's counsel have also discussed at length the position taken by them, that the power of the Guaranty Company to appear in the Federal Court after a decree of dissolution in West Virginia under the West Virginia Statutes, presents a jurisdictional question within the meaning of the act allowing direct appeals.

This is a case where a dissolved corporation has been sued and its appearance has been entered under a West Virginia Statute, which expressly continues the existence of the corporate entity after its dissolution, for the very purpose of defending suits like the one here involved. True, under the old common law rule the dissolution of a corporation generally abated all actions against it and rendered it no longer liable to suit. On account of this common law doctrine, in most if not all of the States, statutes have been passed continuing the existence of dissolved corporations for a limited time, and for purposes of suit, etc. The appearance of the Guaranty Company was entered by its proper corporate officers under its corporate seal, and by its theretofore duly and expressly authorized attorneys. The intervening petitioner, Keatley, contends that the appearance of the corporation could only have been entered by the receiver

appointed in West Virginia. This receiver, however, was specifically limited in his jurisdiction to the State of West Virginia by express order of the Court appointing him, and had no power whatever to enter the appearance of the Guaranty Company and had no right to the assets of the Company without the State of West Virginia. All of the assets of the Company were located at its principal office in Chicago and remained, therefore, under the control of the officers of the Company after the decree of dissolution. The complaint of the subsequently appointed West Virginia receiver, Keatley, can go only to the construction of the West Virginia Statute, as to whether the receiver or the officers and the Company's attorneys had authority to enter the appearance of the Company in the Federal Court. The officers of the Company and its authorized attorneys did duly enter the appearance of the Company, and its assets and the stockholders were bound thereby. The questions raised by the intervening petition of Keatley, are not those which involve the jurisdiction of the court as a Federal Court, but are simply questions of general law and equity and are applicable alike to a similar bill filed in any court. There is no question here as to the validity of the service of process, or of waiver of jurisdiction by a general appearance. The Company itself has appeared generally and is bound by the acts of its authorized officers and is not seeking to question in any way its appearance. The attack made upon the appearance is purely collateral.

The issues decided in the cases relied upon by appellant are not parallel to those here involved. In *Davis* v. *R. R. Co.*, 217 U. S., 171, 172, the issue was whether the defendant by the nature of its appearance had waived its right to object to the jurisdiction of the Court, as it did by motion to quash the service of process upon it.

In *Interior Construction Company* v. *Gibney*, 160 U. S., 218, the only matter decided in the lower court was a demurrer to a plea to the jurisdiction based on the ground that the defendants were not residents of the State in which the suit was brought.

In *Kendall* v. *Loom Co.*, 198 U. S., 482, the question raised was as to the validity of the service of process on a resident officer of a corporation in a state where the corporation was not doing business. In the present case, however, the question presented by the intervening petitioner as to the power of the attorneys and officers of the Guaranty Company to appear is simply one of general law and in no way involves the jurisdiction of the Circuit Court as a Federal Court.

III.

Counsel for appellants have to some extent argued upon the merits of the case as though they were now before the Court. We deem it pertinent to correct their suggestion that the receiver appointed in West Virginia was in any way a statutory receiver. Counsel have referred to the cases of *Relfe* v. *Rundle*, 103 U. S., 222, and *Pen-*

dleton v. *Russell*, 144 U. S., 640. The receiver provided for by the West Virginia Statute is merely a general chancery receiver, and is not a statutory officer within the meaning of that term as used in certain of the cases in this Court. The distinction has been pointed out in *Great Western Mining Company* v. *Harris*, 198 U. S., 561, 576, where the Court refers to *Relfe* v. *Rundle*, and calls it an exceptional case in which by statute the entire property of the insolvent company was vested in the state superintendent of insurance, and where his authority did not emanate from the decree of any court.

Under the West Virginia Statute (sec. 58), whether a receiver should or should not be appointed depends upon the discretion of the court. Whatever powers such receiver has would be powers obtained from the decree of the court and he would be subject to the orders and control of the court appointing him, and would not be vested with independent statutory authority to administer the property. The present is merely an action brought to collect and distribute the estate of a dissolved corporation, whose existence has been continued by the statute of the State under which it was incorporated.

In *Bacon* v. *Robertson*, 18 How., 480; and *McGoon* v. *Scales*, 9 Wall., 23, 31, this Court passed upon cases involving facts somewhat similar to the merits of the present case.

Messrs. Edgerton & Gill in their brief (p. 7) on behalf of appellant, are in error: Counsel for the Chi-

cago receiver (Mr. Potter) did *not* appear in the West Virginia Court when Mr. Keatley was there appointed. (Rec., 179.)

We again pray that the motion to dismiss the appeal be granted.

Respectfully submitted,

LEVY MAYER,
Attorney for Edwin A. Potter, Receiver.

Chicago, April 1, 1911.

Office Supreme Court, U. S.
FILED.
MAR 15 1911
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. [redacted] 84

EDWIN M. KEATLEY AS RECEIVER OF AMERICAN GUARANTY COMPANY OF CHICAGO, UNDER APPOINTMENT OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA,

Appellant,

vs.

CARRIE REBECCA FUREY; EDWIN A. POTTER AS RECEIVER OF THE AMERICAN GUARANTY COMPANY OF CHICAGO, BY APPOINTMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS ET AL.,

Appellees.

MOTION OF APPELLEE, EDWIN A. POTTER AS RECEIVER, TO DISMISS APPEAL AND ARGUMENT IN SUPPORT THEREOF.

LEVY MAYER,
Chicago, Illinois,
Attorney for Appellee, Edwin A. Potter, as Receiver.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 612.

EDWIN M. KEATLEY, as Receiver of the American Guaranty Company of Chicago, by appointment of the Circuit Court of Kanawha County, West Virginia,

Appellant,

vs.

CARRIE REBECCA FUREY; EDWIN A. POTTER, as Receiver of the American Guaranty Company of Chicago by appointment of the Circuit Court of the United States for the Northern District of Illinois, *et al.*,

Appellees.

MOTION TO DISMISS APPEAL.

Now comes the appellee, Edwin A. Potter, as receiver of the American Guaranty Company of Chicago by appointment of the Circuit Court of the United States in and for the Northern District of Illinois, Eastern Division, and moves this court to dismiss this appeal on the ground that this court has no jurisdiction because, (a) no jurisdictional question has been certified to this court by the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, under and in accordance with Section 5 of the Act of March 3, 1891, and

(b) because no question of the jurisdiction of the Circuit Court of the United States as a Federal Court, was involved in the order or decree from which this appeal has been taken.

In support of the above motion said appellee herewith submits the accompanying brief and suggestions.

EDWIN A. POTTER,
As Receiver, etc.

By Levy Mayer
His Attorney.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

No. 612.

EDWIN M. KEATLEY, as Receiver of the American Guaranty Company of Chicago, by appointment of the Circuit Court of Kanawha County, West Virginia,

vs.

CARRIE REBECCA FUREY; EDWIN A. POTTER, as Receiver of the American Guaranty Company of Chicago by appointment of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, *et al.*

BRIEF AND ARGUMENT ON BEHALF OF THE MOTION OF APPELLEE, EDWIN A. POTTER, AS RECEIVER OF THE AMERICAN GUARANTY COMPANY OF CHICAGO TO DISMISS THE APPEAL HEREIN.

This is an appeal taken to this court direct from the Circuit Court of the United States for the Northern District of Illinois, under Section Five of the Act of March 3, 1891, allowing direct appeals to this court from the Circuit Courts "in any case in which the jurisdiction of the court is in issue." The Act further provides that in such cases the question of jurisdiction alone shall be certified to this court from the court below for decision.

This motion to dismiss the appeal is made

on the grounds, *First*,—that no certificate of jurisdiction has been obtained by the appellant as required by the act; and *Second*,—that the jurisdiction of the Circuit Court as a Federal Court was not in issue.

The order of the Circuit Court allowing this appeal, recites that "*this court is of the opinion that no question of jurisdiction is involved in said order and decree* (the decree appealed from), but allows said appeal without certifying to any jurisdictional question, upon the said Keatley filing an appeal bond in the sum of Five Hundred Dollars ($500.00) with surety to be approved by the court." (Rec., 290.) The Circuit Court, therefore, has certified to no jurisdictional question. On the contrary, it has expressly decreed that no such question is involved.

STATEMENT OF FACTS.

(*All record references are to the printed pages.*)

The American Guaranty Company of Chicago was a corporation organized in 1892 under the laws of West Virginia (Rec., 32-35), for the purposes, among others, of issuing investment, service and income contracts. The principal office of the Guaranty Company, by the express terms of its charter, has always been in the City of Chicago (Rec., 33, 183), and all its property was there located (Rec., 25), the statutory office only being maintained in West Virginia. All of the officers and stockholders have continuously resided at and done business in Chicago (Rec., 183).

On February 1, 1909, there was filed in the Circuit Court of Kanawha County, West Virginia, by all the outstanding stockholders of the American Guaranty Company, a bill in equity to dissolve said corporation, under and in accordance with the West Virginia statutes. The statutes, under which such action was taken, are germane to the questions raised by this motion and we therefore quote them in full. Sections 57, 58 and 59 of the Corporation Act of West Virginia in force on February 1, 1909, (*Code of West Virginia, Ch. 53, Secs. 57, 58 and 59*) provide as follows:

> "Sec. 57.—If not less than one-third in interest of the stockholders of a corporation desire to wind up its affairs, they may apply by a bill in chancery to the circuit court of the county in which the principal office or place of busi-

ness of such corporation is situated, or, if there be no such office or place of business in this state, to the circuit court of the county in which the other stockholders or any one or more of them reside, or are found, or in which the property of such corporation or any part of it may be, setting forth in the bill the grounds of their application; and the court may thereupon proceed according to the principles and usages of equity to hear the matter, and if sufficient cause therefor be shown, to *decree a dissolution of the corporation, and make such orders and decrees, and award such injunctions in the cause as justice and equity may require.*

Sec. 58.—When a corporation expires, or is dissolved, or before its expiration or dissolution, upon sufficient cause being shown therefor, such court, as is mentioned in the preceding section, *may, on application of a creditor or stockholder,* appoint one or more persons to be receivers to take charge of and administer its assets; *and whether such receiver be appointed or not,* may make such orders and decrees, and award such injunctions in the cause as justice and equity may require. This section shall apply to corporations heretofore or hereafter chartered by another state, which may have done business and acquired property, or contracted debts, in this state, and any of whose creditors, or stockholders, or their personal representatives, reside herein; and the circuit court of any county wherein such creditor, stockholder, or personal representative, may reside, or where such assets or property, or part thereof may be, or where the person owing such debts, or having such property in possession, may reside, shall afford such relief as is prescribed in this and the next section.

Sec. 59.—When a corporation shall expire or be dissolved, *its property and assets, shall, under the order and direction of the board of directors then in office, or the receiver or receivers*

appointed for the purpose by such circuit court as is mentioned in the fifty-seventh section of this chapter, be subject to the payment of the liabilities of the corporation, and the expenses of winding up its affairs, and the surplus, if any, then remaining, to distribution among the stockholders according to their respective interests. *And suits may be brought, continued or defended, the property, real or personal, of the corporation be conveyed or transferred under the common seal or otherwise, and all lawful acts be done in the corporate name, in like manner and with like effect as before such dissolution or expiration;* but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

The bill of complaint in the Circuit Court of Kanawha County, West Virginia, was filed and joined in by all the outstanding stockholders of the Guaranty Company, and the Guaranty Company was made defendant thereto (Rec., 23-29); the Guaranty Company, on February 1, 1909, filed its answer to said bill, and consented to the granting of the prayer thereof, and to the entry of the decree of dissolution, and to the appointment of a receiver. (Rec., 29.) On February 1, 1909, the Circuit Court of Kanawha County, West Virginia, after a hearing upon the bill of complaint and the answer thereto, entered a decree, dissolving the Guaranty Company, and appointed V. L. Black of Charleston, West Virginia, "receiver of all and singular, the property and assets of the American

Guaranty Company of every description, *within the jurisdiction of the court*, to have and to hold, and to administer the same under the orders and directions of this court. * * * The receiver is hereby directed to take all and such steps as may be necessary to secure possession of the property *within the jurisdiction of this court.* * * *" (Rec., 53.)

Under Section 58, p. 6, *supra*, the court need not have appointed a receiver at all.

It will be observed that the order expressly limits the powers of the receiver to the property and assets of the Guaranty Company *within the state of West Virginia.* The bill of complaint specifically alleges that all of the property and effects of the Guaranty Company are in the City of Chicago (Rec., 28), except a few cash balances, in nominal amounts due to the Guaranty Company from about fifteen banks outside of Chicago which had been the collecting agents of the Guaranty Company. (Rec., 28.)

The record further shows that the Guaranty Company has no liabilities in West Virginia other than on forty-eight contracts, none of which was in default and the total cash surrender value of which does not exceed $9,751.44. (Rec., 28.)

V. L. Black duly qualified under said appointment as receiver of the property of the Guaranty Company "*within the jurisdiction of this* (West Virginia) court" (Rec., 53), but acquired no property because there was none in West Virginia. (Rec., 28.)

On February 2, 1909, there was filed in the Circuit Court of the United States in and for the North-

ern District of Illinois, Eastern Division, a bill of complaint by Carrie Rebecca Furey *et al.* against said American Guaranty Company of Chicago, alleging that on February 1, 1909, in accordance with the statutes of West Virginia authorizing the same, a bill in chancery had been filed in the Circuit Court of Kanawha County, West Virginia, praying for a decree of dissolution of the Guaranty Company, and setting up the proceedings had in the Circuit Court of Kanawha County on said day; that a decree was entered by said Circuit Court of Kanawha County on February 1, 1909, dissolving said American Guaranty Company, and appointing a receiver of the company's assets located *within the State of West Virginia* (Rec., 6); that in consequence of the entry of said decree of dissolution, the Guaranty Company had become the trustee for its creditors and stockholders of all of its property, assets and effects (*and so it was held by this court in Bacon* v. *Robertson,* 18 How., 480); that the receiver so appointed by the West Virginia court had no jurisdiction outside of the State of West Virginia to collect or enforce collection of all, or any of its property, assets and effects (*and so this court decided in Great Western Min. & Mfg. Co.* v. *Harris,* 198 U. S., 561); that said property, assets and effects were located within the City of Chicago and within the jurisdiction of said United States Circuit Court; that some of the holders of contracts of the Guaranty Company threatened to commence suit by attachment or otherwise, to levy upon the property, assets and effects situate in the State of Illinois, and that by means of such attachment, priority would be secured by

some of the contract holders over others, and the property, assets and effects would be wasted unless they were taken possession of by a receiver to be appointed by said United States Circuit Court to conserve and distribute the estate among those entitled thereto. (Rec., 2-8.)

The answer of the American Guaranty Company to said bill of complaint confessing all the allegations of the bill and consenting to the appointment of a receiver of its property, assets and effects by said United States Circuit Court, signed by its president, secretary and solicitors under the corporate seal, was filed on February 2, 1909. (Rec., 56.) This was in strict accord with Section 59, *supra*, pp. 6-7.

On February 2, 1909, said United States Circuit Court, upon the bill of complaint and the answer and consent thereto, appointed appellee, Edwin A. Potter of Chicago, Illinois, receiver of all and singular the property of the Guaranty Company of every description and of all moneys, claims in action, credits, bonds, stocks and other assets of every kind, and of the other property, real, personal and mixed held or possessed by the company or to which it was entitled or in which it had any interest. And said receiver was directed to take immediate possession of all the property and assets described in said order, and the officers and agents of the Guaranty Company were required to surrender and deliver all its property to said receiver; and the Guaranty Company was directed to execute a deed of all its property to said receiver. (Rec., 57.)

Edwin A. Potter duly qualified as receiver and

proceedings were at once taken by him to reduce and he did reduce all of the property of the Guaranty Company into his possession. On February 3, 1909, a deed was executed by the Guaranty Company conveying all its property of every kind to said Potter as receiver. (Rec., 256.) On February 4, 1909, the cause was referred to a master in chancery of the said United States Circuit Court. (Rec., 257.) Various contested proceedings were thereafter had in that court by said Receiver Potter to secure possession of various assets of the Guaranty Company, and after lengthy arguments and other court proceedings (Rec., 61-125), certain funds belonging to the Guaranty Company and then in the possession of the Royal Trust Company, a Chicago bank were, under the direction of said court, turned over by said bank to Edwin A. Potter as receiver. (Rec., 126.) This fund alone amounted to $566,719.50 and was turned over to said receiver on March 9, 1909. (Rec., 234.)

On March 26, 1909, Edwin A. Potter, as receiver, filed an inventory of the assets and a schedule of the liabilities of the Guaranty Company in said Federal court (Rec., 262); this inventory shewed the assets then in his possession to amount in cash and securities to over One Million Four Hundred Thousand ($1,400,000) Dollars. (Rec., 263.)

On May 26, 1909, the United States Circuit Court entered an order that all contract holders or other persons, having claims against the American Guaranty Company, should present and file such claims on or before September 1, 1909, with

James S. Hopkins, a master in chancery of that court. (Rec., 267.) A notice of said order was mailed to every contract holder, creditor and claimant of said Guaranty Company. (Rec., 164, 175.) Under and in accordance with said order and an additional order there were filed with the Master in Chancery seven thousand two hundred and nineteen (7,219) separate proofs of claim against the Guaranty Company. (Rec., 223.) As already stated only forty-eight of such contract holders live in West Virginia, and those forty-eight contracts have a cash surrender value of only $9,751.44. (Rec., 28.) The holders of contracts of the Guaranty Company are scattered throughout nearly all the states of the Union.

A contract holders' committee was given leave to intervene in the United States Circuit Court on February 8, 1909. (Rec., 61.) This committee represented as attorneys in fact under signed agreements, five thousand two hundred and seventy-seven of the contract holders and creditors of the Guaranty Company and joined in the proceedings. (Rec., 59, 61.) The committee prayed that all of the assets and property of the Guaranty Company should be delivered into the hands of Edwin A. Potter, as receiver. (Rec., 126-7.) Mr. Potter, as receiver, has been duly and daily proceeding with the administration of the estate of the Guaranty Company, and as a result of his administration now has in his possession all its undisturbed property, assets and effects, amounting as per inventory filed March 26, 1909 (Rec., 169), to $1,409,234.07, subject to the order and control of said United States Circuit Court.

On September 22, 1909, *nearly eight months after* the appointment of Mr. Potter, as receiver, by the United States Circuit Court, one W. R. Gilliam, who had previously (August 24-September 1, 1909, Rec., 223) *filed with the Master in Chancery* of the United States Circuit Court his claims against the American Guaranty Company, under and in accordance with the orders of the United States Circuit Court (Rec., 223), filed a petition in the Circuit Court of Kanawha County, West Virginia, alleging that he was a creditor of the Guaranty Company, and asking to be made party defendant to the proceedings theretofore had in the Kanawha County Circuit Court, and that said court discharge the receiver theretofore appointed therein and appoint a new receiver with enlarged jurisdiction. (Rec., 183.) On the same day, September 22, 1909, the Circuit Court of Kanawha County (expressly refusing the plaintiffs in that cause time to answer the petition Rec., 180), discharged V. L. Black as receiver, and appointed one Edwin M. Keatley, of Charleston, W. Va., receiver of the American Guaranty Company, and authorized him to take the custody, possession and control of all the property, and assets of the American Guaranty Company situate in that state *or in any other state*, and to distribute the same (Rec., 179-182), thus enlarging the powers of the West Virginia receiver whose authority had theretofore on February 1, 1909 (Rec., 53) been expressly limited to the State of West Virginia. (Rec., 53.) This subsequent order was entered in the West Virginia state court on September 22, 1909, notwithstanding the fact that at that time all the prop-

erty and assets of the Guaranty Company were in the possession and control of the United States Circuit Court for the Northern District of Illinois, and were there being duly administered by that court and its receiver (Rec., 231-234), under an order of the Federal court entered on February 2, 1909 (Rec., 57-8).

On October 27, 1909, Edwin M. Keatley, so appointed receiver by the Circuit Court of Kanawha County on September 22, 1909, filed an intervening petition in the United States Circuit Court for the Northern District of Illinois (Rec., 215). That intervening petition (Rec., 128-135) sets up the appointment of Keatley as receiver by the Circuit Court of Kanawha County on September 22, 1909, and alleges that he was advised that the decree of the Circuit Court of Kanawha County dissolving the Guaranty Company on February 1, 1909, was fully authorized by the West Virginia statutes and deprived the Guaranty Company absolutely of any power or authority to act in any manner whatsoever as a corporation thereafter, and ended the authority of its directors to act in its behalf except as expressly provided by Section 59 of the West Virginia statutes heretofore quoted: that said decree of dissolution prevented the Guaranty Company from appearing in said United States Circuit Court in Illinois and submitting to its jurisdiction; and that the Guaranty Company, upon its dissolution, could only finish its business, conserve and marshal its assets, pay and discharge its lawful indebtedness, and distribute and dispose

of its surplus funds, if any, by and through the direction, orders, judgments and decrees of the Circuit Court of Kanawha County, West Virginia; that any attempt so to do "or any interference with the property, business or assets of said defendant corporation *by any other court wherever situate*, except ancillary to and upon the request and authority of said court of original jurisdiction would be wholly unwarranted, and without competent jurisdiction, and all the acts, orders, directions, judgments and decrees of such other court and all its proceedings, would in that respect, be *coram non judice* and without right" (Rec., 133-134); that the appearance in the United States Circuit Court in Illinois of the Guaranty Company on February 2, 1909, and its answer to the bill of complaint consenting to the appointment of a receiver at a time when the corporation had been dissolved, and a receiver appointed in the State of West Virginia on February 1, 1909, gave the United States Circuit Court no jurisdiction whatever (Rec., 134); and in conclusion, the intervening petition prayed "that by virtue of the order so made by said Circuit Court of Kanawha County, West Virginia, appointing the petitioner receiver of said court for the property and assets of said defendant, American Guaranty Company of Chicago, it becomes the duty of your petitioner to ask permission of this Honorable Court to intervene specially in this action, not acknowledging, but on the contrary, protesting the jurisdiction of this Honorable Court in the premises, and to ask that this Honorable Court permit to be filed herein this peti-

tion for the purpose aforesaid, and to the end that, after proper answer, the issues framed may be heard in this Honorable Court and finally determined, and that the order and decree of this Honorable Court be made and entered, as the rules of equity shall require." (Rec., 134-135.)

The answer of the American Guaranty Company to this petition of Keatley was duly filed on October 27, 1909 (Rec., 216-225). It sets up *in haec verba*, among other things, the resolution passed at a meeting of the Executive Committee of the Guaranty Company, which (as the answer alleges under the by-laws of the Company) had all the powers of the Board of Directors, held on January 30th, 1909 (two days *before* the entry of the decree of dissolution in West Virginia). The said resolution was as follows:

> "Resolved further, That Messrs. Gorham & Wales, Attorneys of Chicago, Illinois, be and they are hereby retained, requested and directed to enter the appearance of said Company (Guaranty Company) in any proceedings that may be instituted in any court, State or Federal, sitting in Chicago, Illinois, and in such proceedings to consent to the appointment of a receiver or receivers to take charge of and administer the assets of said Company located in the State of Illinois or elsewhere, and to consent to the entry of any and all other orders and decrees in the cause that may be so instituted in Illinois, as they may think proper or as justice and equity may require, and throughout such proceedings last aforesaid to act for and on behalf of and represent said Company as its attorneys and solicitors therein." (Rec., 218.)

Pursuant to that resolution, the appearance of the Guaranty Company was filed in the Federal Court on

February 2, 1909, by the Guaranty Company by its president and secretary, under its corporate seal, and by its above named attorneys. (Rec., 56.)

The answer further sets up that under the statutes (Sec. 59) of West Virginia, after a decree of dissolution, *suits may be* brought, continued or *defended, and all lawful acts be done in the corporate name in like manner and with like effect as before the dissolution of said corporation*, so far as shall be necessary or proper for collecting the debts and claims due the corporation, converting its property and assets into money, prosecuting and protecting its rights, and enforcing its liabilities, and paying over and distributing its property and assets or the proceeds thereof to those entitled thereto; that the bill filed in the United States Circuit Court was for the purpose of collecting debts and claims due to the defendant, and for converting its property and assets into money and for protecting and prosecuting its rights, etc., within the meaning of the statutes of West Virginia; and that the Guaranty Company continued in existence as a corporation for that purpose, and for the purpose of defending said suit, notwithstanding the decree of dissolution entered in West Virginia on February 1, 1909. (Rec., 219, 220.) And so the United States Circuit Court expressly held, after the citation of controlling authorities. (Rec., 285).)

The answer further sets up the nature and character of the proceedings instituted by said Gilliam in West Virginia, which resulted in the appointment of Keatley as receiver, and made as an exhibit thereto, the answer filed by the Guaranty Company

in the West Virginia court to the petition of Gilliam, and which latter answer set up in the West Virginia court all the proceedings theretofore had in the United States Circuit Court, and showed that the property was in process of administration and distribution by said United States Circuit Court through its receiver, and that the time for filing claims against said estate in the United States Circuit Court by order of that court had expired September 1, 1909, long prior to the appointment of Keatley as receiver by the West Virginia Court. (Rec., 222-279.) Answers resisting the intervening petition of Keatley in the United States Circuit Court were also filed by Mr. Potter as receiver, and by the contract holders' committee, by Carrie Rebecca Furey, and Caroline Latour Furey. (Rec., 279-280.)

An oral motion was made by said Keatley requesting the United States Circuit Court to turn over to him all of the property and assets of said Guaranty Company then held by Edwin A. Potter as receiver under appointment from said United States Circuit Court. (Rec., 287.) After full hearing and argument, Judge Kohlsaat on January 26, 1910, filed an opinion (Rec., 280-288), denying the prayer of the intervening petition of Keatley. (Rec., 286.)

On February 7, 1910, the United States Circuit Court entered an order dismissing the intervening petition of Keatley. The order, reciting the hearing of the petition, and the answers thereto, and the motion of the petitioner for an order directing Potter as receiver to turn over the property and assets of the Guaranty Company to the petitioner sets forth:

"And the court having heretofore taken all of said matters under advisement and now having duly considered the same, and being fully advised in the premises, finds: that it has jurisdiction in the premises, *that there is no equity in said intervening petition* or in said motion and that said intervening petitioner, Edwin M. Keatley, is not entitled to any of the relief prayed for in said intervening petition or in said motion.

Wherefore, the premises considered, it is hereby ordered, adjudged and decreed that said intervening petition and the said motion, and each of them, shall be and the same are hereby overruled and denied, and the said intervening petition is hereby ordered to be, and the same is hereby dismissed." (Rec., 287.)

Subsequently, a petition for an appeal from said order was filed May 6, 1910 (Rec., 288), by Keatley together with an assignment of errors, and on May 6, 1910, the following order allowing the appeal was entered:

"Now comes Edwin M. Keatley, by his solicitors, and presents his petition for an appeal and assignment of errors, praying an appeal to the United States Supreme Court from the order and decree entered herein on February 7, 1910.

This court is of the opinion that no question of jurisdiction is involved in said order and decree but allows said appeal without certifying to any jurisdictional question upon the said Keatley filing an appeal bond in the sum of Five Hundred Dollars ($500.00) Dollars with surety to be approved by the court." (Rec., 290.)

No certificate of jurisdiction was obtained from the Circuit Court by the appellant herein.

BRIEF.

I.

THIS APPEAL SHOULD BE DISMISSED BECAUSE NO CERTIFICATE OF JURISDICTION WAS OBTAINED FROM THE CIRCUIT COURT AND NO EQUIVALENT OF A CERTIFICATE OF JURISDICTION IS SHOWN BY THE RECORD.

Courtney v. *Pradt*, 196 U. S., 89.
Filhiol v. *Torney*, 194 U. S., 356.
Chappell v. *U. S.*, 160 U. S., 507.
The Bayonne, 159 U. S., 687, 693.
Shields v. *Coleman*, 157 U. S., 168, 176.

II.

THE JURISDICTION OF THE CIRCUIT COURT AS A FEDERAL COURT WAS NOT INVOLVED WITHIN THE MEANING OF THE ACT ALLOWING A DIRECT APPEAL TO THIS COURT. THE SUBJECT MATTER WAS A CONTROVERSY AS TO THE POSSESSION OF THE PROPERTY OF A CORPORATION, BETWEEN A RECEIVER APPOINTED BY THE FEDERAL COURT AND A RECEIVER SUBSEQUENTLY APPOINTED BY A STATE COURT, AND INVOLVED THE CONSTRUCTION OF THE WEST VIRGINIA STATUTES, AND A QUESTION OF GENERAL LAW.

Fore River Ship Building Company v. *Hagg*, 219 U. S., 175.
Louisville Trust Co. v. *Knott*, 191 U. S., 225.
Courtney v. *Pradt*, 196 U. S., 89.
Bache v. *Hunt*, 193 U. S., 523.
Board of Trade v. *Hammond Elevator Co.*, 198 U. S., 424.
Schweer v. *Brown*, 195 U. S., 171.

ARGUMENT.

I.

THIS APPEAL SHOULD BE DISMISSED BECAUSE NO CERTIFICATE OF JURISDICTION WAS OBTAINED FROM THE CIRCUIT COURT AND NO EQUIVALENT OF A CERTIFICATE OF JURISDICTION IS SHOWN BY THE RECORD.

The appeal taken from the Circuit Court direct to this court is under an order of the Circuit Court for the Northern District of Illinois, Eastern Division thereof, and is not accompanied by any certificate of jurisdiction as required by Section 5 of the act allowing direct appeals. The order allowing the appeal recites:

> "*This court is of the opinion that no question of jurisdiction is involved in said order and decree, but allows said appeal without certifying to any jurisdictional question,* upon the said Keatley filing an appeal bond in the sum of Five Hundred Dollars ($500) with surety to be approved by the court." (Rec., 290.)

The petition for appeal recites that:

> "The above named Intervenor, Edward M. Keatley, conceiving himself aggrieved by the order and decree entered on the 7th day of February, 1910, in the above entitled proceeding, dismissing his intervening petition herein, based solely upon the ground that this Honorable Court has never obtained jurisdiction of the person of the defendant, American Guaranty Company of Chicago, because of the lack of service of process on said defendant, and because no proper or legal voluntary appearance by said defendant was or could be made herein,

doth hereby appeal from said order and decree to the Supreme Court of the United States and he prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree were made, *together with the written opinion* (Rec., 280) of the Honorable Christian C. Kohlsaat, on such question of jurisdiction rendered but not filed herein, duly authenticated, may be sent to the Supreme Court of the United States." (Rec., 288.)

It is assigned for error by the appellant (Rec., 289), *first*, that the Circuit Court

> "erred in taking jurisdiction of and over the person and property of the defendant American Guaranty Company of Chicago, after the decree of dissolution of, and appointment of a receiver for said defendant entered pursuant to express statute by a court of competent jurisdiction in the state of defendant's domicile, such jurisdiction of the said Circuit Court of the United States resting solely upon a pretended *appearance by attorneys for said defendant appointed as such before the said dissolution and a similar pretended voluntary appearance by the former president and secretary of said defendant corporation,*"

and, *second*, that the Circuit Court

> "erred in making and entering its order and decree dated February 7, 1910, denying and dismissing the petition and motion of Edwin M. Keatley as receiver of said defendant corporation appointed by the said State Court, for right to intervene and have and receive as such officer, the property and assets of said defendant corporation now in the possession of said United States Circuit Court." (Rec., 289.)

The order of February 7, 1910, from which the appeal was taken recites the coming on of the mo-

tion and the hearing of the same upon the intervening petition filed by the appellant and the answers thereto and

> "*finds that it has jurisdiction in the premises, that there is no equity in said intervening petition or in said motion*, and that said intervening petitioner, Edwin M. Keatley, is not entitled to any of the relief prayed for in said intervening petition *or in said motion*. Wherefore, the premises considered, it is hereby ordered, adjudged and decreed that said intervening petition and the said motion, and each of them, shall be and the same are hereby overruled and denied, and that said intervening petition is hereby ordered to be and the same is hereby dismissed." (Rec., 287.)

It is clear from this order that two separate matters were under consideration by the court; (1) the prayer of the intervening petition of the appellant; and (2) the motion (oral) of the appellant for an order directing the receiver appointed by the United States Circuit Court to turn over the funds and property of the American Guaranty Company to the receiver subsequently appointed by the West Virginia State Court. Both the intervening petition and the motion were denied. The opinion of Judge Kohlsaat filed on January 26, 1910 (Rec., 286), states in part:

> "So I am constrained under the circumstances to hold that at the date of the institution of this suit the West Virginia receiver was not vested with control and title to the property in the possession of the receiver herein, but that the same was at most held by the corporation in trust for creditors and stockholders; *that this court being a court in equity has juris-*

diction in the premises. The claim that the jurisdiction of this court was in any manner affected by the September order of the West Virginia court does not appeal to me as well founded, nor is it clear how the creditors and stockholders can be injured by the administration. In the interest of comity I should gladly in the proper case release jurisdiction at the request of a brother judge, especially since he seems to feel personally at fault for the present situation. Believing, however, that his action was wise and desiring to co-operate with him in doing all that a court of equity may do to conserve the rights of creditors and stockholders, and feeling as I do that to grant the motion of the petitioners would be unjust to them and seeing no reason why complication should result, I am of the opinion that the prayer of the intervening petitioner should be and it is denied."

From the opinion of the Circuit Court it is not open to dispute that the finding inserted in the order of February 7, 1910, from which this appeal is taken, namely "that it has jurisdiction in the premises" refers to the holding of Judge Kohlsaat, as shown in his opinion, that his court had jurisdiction as a court of equity.

Ordinarily, as this court has held, a certificate of jurisdiction is essential unless the record shows that the only matter tried and decided in the Circuit Court was one of jurisdiction. *Filhiol* v. *Torney*, 194 U. S., 356. It is apparent from the opinion of the Circuit Court that the question of the jurisdiction of that court as a Federal Court was in no way involved. The court in its opinion considered the matter as one affecting its jurisdic-

tion as a court of equity. The opinion, and the order dismissing the intervening petition and overruling the motion made by the intervening petitioner for the surrender of the funds to him as receiver, demonstrate that equitable matters were under consideration by the court. The intervening petition was filed by the receiver appointed for the same company by the West Virginia court nearly eight months *after* the appointment of a receiver for the same company by the United States Circuit Court, and the West Virginia receiver prayed that the funds of the company might be transferred to him as the receiver appointed in the domiciliary state of the corporation.

From the petition for appeal it is apparent that the appeal is prayed for generally; the petition merely reciting that the petitioner feels himself aggrieved by the decree dismissing his intervening petition based solely upon the ground that the Circuit Court never obtained jurisdiction of the person of the defendant, etc. The recital in the petition for appeal "based solely upon the ground," etc., clearly refers to the petitioner's construction of his intervening petition, and does not relate to any grounds for an appeal. It is assigned for error by the appellant that the Circuit Court erred in denying and dismissing the intervening petition and overruling a motion of the appellant to have and receive as a West Virginia receiver the property and assets of the Guaranty Company now in the possession of the United States Circuit Court. The Circuit Court would not certify to any jurisdictional question, but allowed the appeal gener-

ally. It further appears from an inspection of the record that a jurisdictional question *only* was not involved. And this court holds that where other than jurisdictional questions are involved a formal certificate of jurisdiction is essential to the maintenance of an appeal.

In *Chappell* v. *United States*, 160 U. S., 499, 507 (1896), referring to a case appealed under the first paragraph of section 5, allowing direct appeals to this Court where the question of jurisdiction of the Circuit Court is in issue, it is said:

> "In order to bring a case within the first class not only must it appear of record that a question of jurisdiction was involved below, but that question and that alone must be certified to this court. *If both a question of jurisdiction and other questions were before the court below and a writ of error is allowed in the usual and general form to review its judgment without certifying or specifying the question of jurisdiction this court cannot take jurisdiction under this clause of the statute.*"

This court said further:

> "There is no formal certificate of any question of jurisdiction; the allowance of the writ of error is general, and not expressly limited to such a question; and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the 'rulings, judgments and orders' of the court 'upon the question of jurisdiction raised in said exceptions, pleas and demurrers and the other papers on file in this cause,' without defining or indicating any specific question of jurisdiction. Here, certainly, is no such clear, full and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate under the first clause of the statute."

In *Shields* v. *Coleman*, 157 U. S., 168 (1895) it is said with reference to cases where a formal certificate of jurisdiction may be dispensed with:

> "It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration that the *single* matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully and separably stated. *No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of the record to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction.* And that is here shown. The petition for an appeal is upon the single ground that the court wrongfully took jurisdiction of the property, because it was then in the possession of the state court, and in the order allowing the appeal it is explicitly stated that 'this appeal is granted *solely upon the question of jurisdiction*,' and the court at the same time reserved to itself the right, which it subsequently exercised, of determining what portions of the proceedings should be incorporated into the record sent here for the purpose of presenting this question."

In the present case there is no "plain declaration" or declaration whatever that a question of jurisdiction is before this court; none has been certified and this court cannot be asked to follow counsel for the appellant in searching the record for the purpose of ascertaining whether the judgment of the lower court turned upon some question of jurisdiction. And if this Court does search the record it will find from

the opinion (certified into the record at the instance of appellant, Rec., 288) of the Circuit Court that it considered the matter entirely one of equitable jurisdiction and as calling for the application of equitable principles.

In *The Bayone*, 159 U. S., 687 (1895), where an appeal was taken direct from the District Court to this court, it was said (page 692):

> "Nor do we think that the allowance of the appeal can be treated as a certificate. The prayer for appeal did, indeed, state that claimant appealed 'upon the ground that this court was without jurisdiction to make the said decree,' but it specified no question of jurisdiction, and asked 'that a transcript of the record and proceedings and papers upon which said final decree was made should be sent up,' as if the appeal were on the whole case. The entry of the district judge thereon was "appeal allowed.' This was wholly insufficient to subserve any other than the ostensible purpose."

This court there held that the appeal should be dismissed for want of jurisdiction, because of the lack of the proper certificate. It will be observed in the present case the petition for appeal prays that the appeal

> "May be allowed and that a transcript of the record and proceedings and papers upon which said order and decree were made"

may be sent up. This likewise is as if the appeal were taken from the entire order of February 7, 1910, and it should be further noted that there is no prayer whatever in the petition for appeal (Rec., 288) that any question of jurisdiction be certified to

this Court as required by the act of Congress. On the contrary the order for appeal recites that:

> "This court is of the opinion that no question of jurisdiction is involved in said order and decree. * * *" (Rec., 290.)

In *Courtney* v. *Pradt*, 196 U. S., 89 (1905), where an appeal was allowed from a Circuit Court direct to this court, but no certificate of a question of jurisdiction was applied for or granted, this Court said:

> "And the general rule is that the certificate is an absolute pre-requisite to the exercise of jurisdiction here. *Maynard* v. *Hecht*, 151 U. S., 324.
>
> Although we have recognized exceptions to the rule when the explicit terms of the decree, or even of the order allowing an appeal, might properly be considered as equivalent to the formal certificate. *Huntington* v. *Laidley*, 176 U. S., 668; *Arkansas* v. *Schlierholz*, 179 U. S., 598. But, as, stated by Mr. Justice Gray in *Huntington* v. *Laidley*, 'the record must definitely and unequivocally show that the court below sends up for consideration a *single* and definite question of jurisdiction,' that is, of the jurisdiction of the court as a court of the United States. No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. No *single* and definite issue as to the jurisdiction of the Circuit Court as a Federal Court is presented."

We submit that in all the cases in which this Court has allowed an appeal to be maintained without a formal certificate of jurisdiction it has been apparent either from the order allowing the appeal or from the petition of appeal and assignment of errors that the *sole* matter tried and decided in the Circuit

Court was one of jurisdiction. But where it is apparent as here that other questions were decided in the lower court, or where error is assigned on other than jurisdictional questions, the lack of a formal certificate has been held fatal to an appeal, and such appeals have been dismissed upon motion.

We pass now to a still more decisive objection to the maintenance of this appeal.

II.

THE JURISDICTION OF THE CIRCUIT COURT AS A FEDERAL COURT WAS NOT INVOLVED WITHIN THE MEANING OF THE ACT ALLOWING A DIRECT APPEAL TO THIS COURT. THE SUBJECT MATTER WAS A CONTROVERSY AS TO THE POSSESSION OF THE PROPERTY OF A CORPORATION, BETWEEN A RECEIVER APPOINTED BY THE FEDERAL COURT AND A RECEIVER SUBSEQUENTLY APPOINTED BY A STATE COURT, AND INVOLVED THE CONSTRUCTION OF THE WEST VIRGINIA STATUTES, AND A QUESTION OF GENERAL LAW.

In the very recent case of *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S., 175 (decided January 3, 1911), this court, by Mr. Justice Day, said:

> "The court has had frequent occasion to determine what is meant in the statute providing for review of cases in which the jurisdiction of the court is in issue, and it has been held that the statute means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, *but of the jurisdiction of the court as a Federal Court.*"

The court approvingly quotes from or cites: *Louisville Trust Co.* v. *Knott*, 191 U. S., 225, and *Bache* v. *Hunt*, 193 U. S., 523. In the Fore River

Shipbuilding case the question was whether the United States Circuit Court had jurisdiction to entertain a suit under the Employers' Liability Act of Massachusetts, and the court, in dismissing the appeal, said:

> "Thus having jurisdiction, it was at liberty to decide all questions properly before it, including the one whether, under the applicable principles of law, a court of another sovereignty would enforce a cause of action based upon the Massachusetts statute. But the determination of that question did not involve the jurisdiction of the Circuit Court as a Federal Court. It was a question to be decided upon the application of the same principles as would apply had the action been brought in a court of another state or nation. * * * It was general in its nature and to be determined upon principles controlling in other courts as well as those of Federal creation."

The jurisdiction referred to in the Act "must be one involving the jurisdiction of the Circuit Court as a Federal Court, and not simply its general authority as a judicial tribunal to proceed in harmony with the established rule of practice governing courts of concurrent jurisdiction as between each other" (*Louisville Trust Co.* v. *Knott*, 191 U. S., 225, 233); or as is said in another case, this right of direct appeal is limited "to cases where the jurisdiction of the Federal Court as a Federal Court is put in issue, and that questions of jurisdiction applicable to the state courts as well as to the Federal Courts are not within its scope." (*Board of Trade* v. *Hammond Elevator Co.*, 198 U. S., 424, 432.) It is likewise well settled that questions involving the power of the court as a court of

equity are not questions of jurisdiction within the meaning of the statute. *Smith* v. *McKay*, 161 U. S., 355; *Blythe* v. *Hinckley*, 173 U. S., 501.

The present case involves only a controversy as to the control of the property and assets of the American Guaranty Company between the receiver appointed by the United States Circuit Court and the receiver appointed nearly eight months thereafter by the West Virginia State Court. While this Court has held that a controversy as to whether the Circuit Court or District Court has acquired jurisdiction over a defendant because of alleged invalidity of the service of process upon the defendant is a question of jurisdiction within the meaning of the act and appealable to this Court, the present does not come within such line of cases.

The intervening petition of the appellant Keatley, filed in the United States Circuit Court, was expressly based upon the ground that, under the construction placed upon the statutes of West Virginia by the intervening petitioner, the decree of dissolution of the defendant, American Guaranty Company, entered by the State Court of West Virginia on February 1, 1909, vested the entire property of the Company in a receiver appointed by that court and prevented said Company, by its officers or directors, from in any way thereafter participating in any court proceeding. This, too, in spite of the fact that the West Virginia Court was not required by the statute (Sec. 58) to appoint a receiver, and in fact did appoint a receiver whose jurisdiction was expressly limited to that state. (Rec., 53.)

The question involves the construction of Sections 57, 58 and 59 of the corporation act of West Virginia, heretofore quoted (Brief, pp. 5-7). Section 57 gives to the State Courts power to dissolve corporations upon bill of complaint filed in those courts. Section 58 provides that

> "When a corporation expires, or is dissolved, or before its expiration or dissolution, upon sufficient cause being shown therefor, such court as is mentioned in the preceding section *may,* on application of a creditor or stockholder, appoint one or more persons to be receivers to take charge of and administer its assets; *and whether such receiver be appointed or not,* may make such orders and decrees, and award such injunctions in the cause, as justice and equity may require."

Under the statute it was not necessary that a receiver should be appointed by the West Virginia court.

Section 59 provides in part that after a decree of dissolution has been entered

> "suits may be *brought, continued or defended,* the property real and personal of the corporation to be conveyed or transferred under the common seal, or otherwise, and all lawful acts be done in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

The intervening petitioner Keatley claimed (Rec., 134) that after a decree of dissolution had been entered in the State Court of West Virginia, February 1, 1909, the appearance of the corporation could not, under Section 59 of the statute above quoted, be entered in a proceeding brought in the United States Circuit Court at Chicago on February 2, 1909, for the very purpose of collecting and distributing the assets and property of the Company. This is a question of general law and construction of the West Virginia statute. And so Judge Kohlsaat held, as his opinion shows. (Rec., 280.) The corporation entered its appearance in the suit in the United States Circuit Court and no question is involved of the proper service of process or the validity of any service of process. The intervening petition of Keatley prayed that upon the filing of said intervening petition

> "after proper answer the issues framed may be heard in this honorable court and finally determined and that the order and decree of this honorable court be made and entered, as the *rules of equity* shall require."

And the intervening petitioner further moved that the property and assets of the Guaranty Company be transferred from the Federal receiver to him as the State court receiver, which petition and motion were both denied. (Rec., 287.) The questions raised by the intervening petitioner would apply to any State court as well as to a Federal court, if the present suit had been started in a State court; they are not questions which affect the jurisdiction of the Circuit Court as a Federal Court.

This is clear from the allegations of the intervening petition:

> "That the said defendant corporation upon dissolution as hereinbefore mentioned, under the laws of West Virginia, the state of the creation of said defendant, could only finish its business, conserve and marshal its assets, pay and discharge its lawful indebtedness, and distribute and dispose of its surplus funds, if any, by and through the direction, orders, judgments and decrees of said Circuit Court of Kanawha County, West Virginia, and that any attempt so to do, or any interference with the property, business or assets of said defendant corporation, *by any other court wherever situate, except ancillary to and upon the request and authority of said court of original jurisdiction,* would be wholly unwarranted and without competent jurisdiction, and all the acts, orders, directions, judgments and decrees of such other court, and all its proceedings, would in that respect be *coram non judice* and without right." (Rec., 134.)

It nowhere appears from the record that the jurisdiction of the Circuit Court as a Federal Court was challenged, nor that any issue was raised which would not be applicable to a like bill filed in any court of equitable jurisdiction, State or Federal. The matter involved a contest over the possession of the property of the Guaranty Company between a receiver appointed by the Federal Court and a receiver subsequently appointed by the Circuit Court of Kanawha County, West Virginia. A somewhat similar case is *Louisville Trust Company* v. *Knott*, 191 U. S., 225 (1903). That case arose out of the conflicting claims of the United States

Circuit Court for the Western District of Kentucky and the State Circuit Court of Jefferson County, Kentucky, as to the right to administer the property and affairs of the Evening Post Company, a Kentucky corporation. The Federal Court, having possession by its receiver of the property of that company, declined to surrender possession to the Louisville Trust Company, the receiver appointed by the State Court, and from a final order dismissing the intervening petition of the Louisville Trust Company asking for surrender of the possession, a direct appeal was taken to this Court. The lower court there certified that it had held that its jurisdiction over the trust estate was prior and exclusive to that of the State Court. This Court held that the question presented by the certificate of the Circuit Court was not one of jurisdiction within the meaning of the Act, saying (p. 232):

> "The issue presented by the intervening petition did not raise any question under the Constitution or statutes of the United States, and depended only upon principles of general law applicable to all courts having concurrent jurisdiction over the same subject matter. We repeat that the jurisdiction of the Circuit Court was not, and is not, questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such question should be the basis of a direct appeal to this court from a Circuit Court."

And this Court, upon motion, in that case dismissed the appeal. We submit that the present case is embraced within the principle of the Louisville Trust Company case. The receiver first appointed by the West Virginia court on February 1, 1909, was specifically limited in power *solely* to the State of West Virginia by the express order of the court (Rec., 53), and the receiver appointed by the Federal Court on February 2, 1909, upon the appearance and consent of the corporation, was of all of the property of every description of the Guaranty Company. (Rec., 57-8.) The corporation was expressly authorized to appear by the very words of Section 59 of the West Virginia corporation act, and the United States Circuit Court had full power over all property and assets of the Company. (Rec., 57.) The points raised by the intervenors in the present case as to whether the West Virginia receiver or the officers of the Company were the proper persons to enter the appearance in the United States Circuit Court of the dissolved corporation, do not involve any question of jurisdiction of the United States Circuit Court; the same question could and would have been raised if receiver Potter had been appointed by a State court in Illinois. Here, as in the Louisville Trust case, there is a contest between a Federal and a State court receiver. The West Virginia receiver, with powers as to property located *without* the State of West Virginia, was appointed by the State Court on September 22, 1909, long after the appointment on February 2, 1909, of the Federal Court receiver, and long after the property of the Guaranty Company

had been in the possession of, and was being administered upon by, the Federal receiver.

In *Bache* v. *Hunt*, 193 U. S., 523 (1904), Hunt as receiver filed an intervening petition in a foreclosure suit pending in the Circuit Court for the reimbursement of certain amounts paid by him as receiver in the extinguishment of prior claims that certain railroad stock and bonds had been deposited to secure. A decree was made in his favor and an appeal taken direct to this Court. Upon motion to dismiss the appeal, which was granted, it was held that:

> "The jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved."

In *Courtney* v. *Pradt*, 196 U. S., 89 (1905), it appeared that a citizen of Wisconsin, duly qualified as an executor in that state, was sued, as such executor, in the state courts in Kentucky. Pradt demurred on the ground that the court had no jurisdiction and the Circuit Court of the United States to which the case had been removed, sustained the demurrer and dismissed the suit on the ground that there was no jurisdiction in the courts of Kentucky in the suit against a foreign executor. This Court held that Circuit Courts have power to so adjudicate, and that the question decided was not one of the jurisdiction of the Circuit Court of the

United States, as a Federal Court, but one with respect to the laws of Kentucky, and dismissed the appeal. The court there said:

> "It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the Circuit Court as a court of the United States, and not in respect of its general authority as a judicial tribunal."

In the present case, the intervening petitioner Keatley alleged in his petition that "where a receiver of the said dissolved corporation is appointed for the purpose of winding up the corporate business and affairs, the officers of said corporation are absolutely deprived of all authority to act, except as directed by said court or requested by the said receiver." (Rec., 133.)

The question thus raised by the intervenor relates, therefore, to the construction of the West Virginia statutes as to whether the officers of the dissolved corporation or the receiver of the State court should have entered the appearance of the Guaranty Company in the Federal Court. The question decided was with respect to general law and the laws of West Virginia and not with respect to the jurisdiction of the Circuit Court as a Federal Court.

If it should be contended by appellant that the present case comes within the ruling in *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S., 424 (1905), where it was held that questions as to the validity of the *service of process* in a Federal Court are questions of jurisdiction, justifying a direct appeal the answer is as we have already argued, that the present case does not involve any

question as to the service or the validity of the service of any process upon the defendant, Guaranty Company. Its appearance and answer were entered and filed within the express authority of the statutes of West Virginia.

But more than all this, the resolution passed by the Executive Committee of the Guaranty Company January 30, 1909 (one day before the appointment of the first West Virginia receiver and two days before the appointment of the Federal receiver) directed:

> "That Messrs. Gorham & Wales, Attorneys of Chicago, Illinois, be and they are hereby retained, requested and directed to enter the appearance of said Company (Guaranty Company) in any proceedings that may be instituted in any court, State or Federal, sitting in Chicago, Illinois, and in such proceedings to consent to the appointment of a receiver or receivers to take charge of and administer the assets of said Company," etc. (Rec., 218.)

Pursuant to that resolution, the Guaranty Company, on February 2, 1909 (Rec., 56), filed its appearance and consented to the appointment by the United States Circuit Court of Receiver Potter. That appearance and consent was signed by the Guaranty Company, by its President (Frederick M. Steele) attested by its Secretary under its corporate seal, and also by "Gorham & Wales, its Solicitors." (Rec., 56.) The resolution authorized Messrs. Gorham & Wales to enter the appearance of their client (the Guaranty Company) "in any proceedings that may be instituted in any court, State or Federal, sitting in Chicago," etc. (Rec., 218.) If those

attorneys had entered the appearance of their client to a bill precisely like the present one, but filed in the State rather than in the Federal Court, the question of the power of those attorneys, as well as of the president and secretary, to sign the name of the Guaranty Company to the appearance and consent, would have been one of general law, to be passed upon and determined by the State court. The fact that the appearance and consent were filed in the Federal Court does not change the rule. The question is one of general law and is in no way dependent on the particular jurisdiction of the United States Circuit Court as a Federal Court.

We respectfully urge that the motion of the appellee to dismiss the appeal herein should be granted. The inventory filed by the receiver in the Federal Court on March 26, 1909, shows assets in his possession amounting, in cash and securities, to over $1,400,000. (Rec., 263.) Seven thousand two hundred and nineteen claimants have filed proofs of claims with the Master in Chancery to whom the matter was referred by the Federal Court. (Rec., 223.) Only forty-eight contract-holders reside in West Virginia. These forty-eight contracts have a cash surrender value of not to exceed $9,751.44. (Rec., 28.) In fact a specific exhibit shows that there are only thirty-five contract-holders residing in West Virginia. (Rec., 172.) Edwin M. Keatley was appointed receiver in the West Virginia State Court on September 22, 1909. (Rec., 179.) He was appointed such receiver upon the petition of W. R. Gilliam, filed in the West Virginia State Court on September 22,

1909. (Rec., 183.) W. R. Gilliam resides in St. Paul. (Rec., 184.) He, therefore, can have no interest, such as a West Virginia claimant might feign, in endeavoring to have the estate of the Guaranty Company administered upon in the West Virginia courts. Furthermore, W. R. Gilliam, at the time he filed his intervening petition in the West Virginia court, had already submitted to the jurisdiction of the United States Circuit Court at Chicago; he had theretofore filed with the Federal Master in Chancery (James S. Hopkins) his (Gilliam's) claims; and those claims were filed on August 24 and 28, and September 1, 1909 (Rec., 237); and the principal of those claims is for alleged damages for an alleged breach of "an alleged renewal agency commission contract." (Rec., 237.)

The creditors are pressing for their distributive shares of the estate and are in need of their dividends. There is a large amount of assets in the hands of the Federal Court receiver awaiting distribution.

What legal or equitable benefit can it be to Mr. Gilliam, of St. Paul, or to the creditors generally, that this estate should be taken bodily from the Federal Court at Chicago and removed into the State Court in West Virginia, merely for purposes of distribution? In the language of the United States Circuit Court (Judge Kohlsaat) (Rec., 286):

> "The claim that the jurisdiction of this court was in any manner affected by the (subsequent) September order of the West Virginia court does not appeal to me as well founded. Nor is it clear how the creditors and stockholders can

> be injured by the administration. * * * Feeling, as I do, that to grant the motion of the petitioner would be unjust to them (creditors and stockholders), and seeing no reasons why any complications should result, I am of the opinion that the prayer of the intervening petitioner should be and it is denied."

In some of its aspects this case is not unlike *In re Cleland*, 218 U. S., 120, decided May 31, 1910; in which this Court said:

> "It cannot be believed the motive for the petition is such as to appeal to the discretion of the court."

We respectfully suggest that it would work hardship to postpone the disposition of this matter until the case is reached in regular order on the calendar, and we therefore pray for a present consideration of this motion, and that the appeal should be dismissed.

Respectfully submitted,

LEVY MAYER,
Attorney for Edwin A. Potter, Receiver.

CHICAGO, March 4, 1911.